(16)

No. 00-1260-CFY Title: United States, Petitioner
v.
Mark James Knights

Docketed: February 2, 2001 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Dec 21 2000	Application (00A557) to extend the time to file a petition for a writ of certiorari from January 3, 2001 to February 2, 2001, submitted to Justice O'Connor.
	Dec 26 2000	Application (00A557) granted by Justice O'Connor extending the time to file until February 2, 2001.
	Feb 2 2001	Petition for writ of certiorari filed. (Response due April 4, 2001)
	Feb 27 2001	Brief amicus curiae of California filed.
	Mar 1 2001	Order extending time to file response to petition until April 4, 2001.
	Apr 4 2001	Motion of Rutherford Institute for leave to file a brief as amicus curiae filed.
	Apr 4 2001	Brief of respondent Mark James Knights in opposition filed.
	Apr 4 2001	Motion of respondent for leave to proceed in forma pauperis filed.
	Apr 17 2001	DISTRIBUTED for Conference of May 10, 2001
	Apr 26 2001	Reply brief of petitioner United States filed.
	Apr 26 2001	LODGING consisting of ten copies of lower court material submitted by the Solicitor General and distributed.
	May 14 2001	Motion of Rutherford Institute for leave to file a brief as amicus curiae GRANTED.
	May 14 2001	Motion of respondent for leave to proceed in forma pauperis GRANTED.
	May 14 2001	Petition GRANTED. SET FOR ARGUMENT November 6, 2001. **********
	Jun 14 2001	Order extending time to file petitioner's brief on the merits to and including July 12, 2001.
	Jul 12 2001	Brief of petitioner United States filed.
	Jul 12 2001	Joint appendix filed.
	Jul 12 2001	Brief amicus curiae of Center for the Community Interest filed.
	Jul 12 2001	Brief amicus curiae of Criminal Justice Legal Foundation filed.
	Jul 12 2001	Brief amicus curiae of California filed.
	Aug 3 2001	Order further extending time to file brief of respondent on the merits until August 22, 2001.
	Aug 14 2001	CIRCULATED.
	Aug 17 2001	Brief of respondent Mark James Knights filed.
	Aug 22 2001	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
	Aug 22 2001	Brief amici curiae of California Public Defenders Association, et al. filed.
	Aug 22 2001	Brief amicus curiae of Rutherford Institute filed.
	Sep 5 2001	Record filed.
	Sep 6 2001	Record filed.

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No. 00-1260-CFY

Entry	Date	Proceedings and Orders
	Sep 21 2001	Reply brief of petitioner United States filed.
	Nov 6 2001	ARGUED.

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OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MARK JAMES KNIGHTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether respondent's agreement to a term of probation that authorized any law enforcement officer to search his person or premises with or without a warrant, and with or without individualized suspicion of wrongdoing, constituted a valid consent to a search by a law enforcement officer investigating crimes.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-14a) is reported at 219 F.3d 1138.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 2000. A petition for rehearing was denied on October 5, 2000 (App., *infra*, 39a). On December 26, 2000, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including February 2, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

1. On May 29, 1998, respondent Mark James Knights was placed on summary probation for a drug offense under California law.[1] Summary probation in California does not involve direct supervision by a probation officer. App., *infra*, 4a. As a condition of probation, however, respondent signed a form by which he agreed to "[s]ubmit his * * * person, property, place of residence, vehicle, [and] personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer." C.A. E.R. 73; App., *infra*, 4a. The consent-to-search term, sometimes known as the "Fourth Waiver," see *United States* v. *Ooley*, 116 F.3d 370, 371 (9th Cir. 1997), cert. denied, 524 U.S. 963 (1998), is a common term of probation in California. The California Supreme Court has held that the Fourth Waiver constitutes a valid consent to search. See, *e.g.*, *People* v. *Bravo*, 43 Cal. 3d 600, 605-611 (1987), cert. denied, 485 U.S. 904 (1988).

[1] See C.A. E.R. 58, 73. On that same date, respondent was sentenced to 90 days in jail, to commence on July 3, 1998. *Id.* at 58, 67.

2. Three days after respondent was placed on probation, a Pacific Gas & Electric (PG&E) power transformer and adjacent Pacific Bell telecommunications vault near the Napa County Airport were pried open and set on fire with an incendiary device. App., *infra*, 2a-3a. Respondent had been suspected of prior acts of vandalism against PG&E property, based on his longstanding grudge against the company stemming from a theft-of-services complaint made against him by PG&E investigators and a prior discontinuation of respondent's electrical services for failure to pay his bill. Accordingly, he immediately became a suspect in the case. C.A. E.R. 58; App., *infra*, 2a. After the sheriff's office made a variety of observations that suggested that respondent might be involved in the vandalism,[2] on June 3, 1998, a sheriff's detective searched respondent's apartment, relying on the consent-to-search condition of respondent's probation order. *Id.* at 4a. Based on the evidence found in the search—including detonation cord, ammunition, liquid chemicals, chemistry and electrical manuals, drug paraphernalia, and a brass padlock stamped "PG&E"—respondent was arrested. C.A. E.R. 54; App., *infra*, 4a-5a.

3. Respondent was subsequently indicted by a federal grand jury for conspiracy to commit arson, in violation of 18 U.S.C. 371 and 844(i) (1994 & Supp. IV 1998); being a felon in possession of a firearm, in vio-

[2] Shortly after the arson, a sheriff's deputy drove by respondent's residence and noticed that the hood of the pick-up truck parked in front was warm, suggesting a recent arrival. In addition, an associate of respondent was seen disposing of what appeared to be pipe bombs, and the associate's pick-up truck contained explosive materials and brass padlocks that appeared to match those taken from the PG&E power vault. App., *infra*, 3a-4a.

lation of 18 U.S.C. 922(g)(1); and possession of an unregistered destructive device, in violation of 26 U.S.C. 5861. C.A. E.R. 1-5; App., *infra*, 5a. Respondent moved to suppress the evidence obtained in the June 3 search. *Ibid.*

Relying principally on the Ninth Circuit's decision in *United States* v. *Ooley*, *supra*, the district court granted respondent's motion to suppress. App., *infra*, 15a-38a. The court explained that "[a]lthough not directly addressing the consent issue, [*Ooley*], implicitly if not directly, stands for the proposition that acceptance of a search clause as a condition of probation does not fully abrogate a defendant's Fourth Amendment rights." *Id.* at 25a. The court found that the detective who conducted the search had a "reasonable suspicion" that respondent may have been involved with incendiary materials, "the manufacture of which would be inconsistent with the rehabilitative aspects of his probation." *Id.* at 30a. The court held, however, that the search was conducted for the purpose of obtaining evidence in a criminal investigation into arson or manufacture of incendiary devices. *Id.* at 33a. Based on its conclusion that the search of respondent's house was undertaken for investigative rather than probationary purposes, the court held that the search was invalid and that the items seized during it should be suppressed. *Id.* at 33a-37a.

4. The court of appeals affirmed. App., *infra*, 1a-14a.

The court of appeals acknowledged that "a person can consent to a search of his home," and that "[t]here * * * can be little doubt that [respondent] did consent to searches when he agreed to the terms of his probation." App., *infra*, 7a-8a. The court stated, however, that prior Ninth Circuit decisions "have made it clear that [a probationer's] consent must be seen as limited to

probation searches, and must stop short of investigation searches. We simply have refused to recognize the viability of a more expansive probationary consent to search term." *Id.* at 8a.

The court of appeals found no clear error in the district court's determination that the sheriff's department was investigating criminal activity, rather than conducting a "probation search," since the searching officer was interested in "ending the string of crimes" of which respondent was suspected and was not "interested in [respondent's] rehabilitation." App., *infra*, 10a. While the court conceded that "a probation officer may also wish to end wrongdoing by a probationer," the court found that the law enforcement officer in this case "was using the probation term as a subterfuge to enable him to search [respondent's] home without a warrant." *Ibid.*[3]

The court of appeals also concluded that *Whren* v. *United States*, 517 U.S. 806 (1996), did not undermine its distinction between probation searches and investigation searches. While *Whren* relied on the principle that the lawfulness of a Fourth Amendment intrusion based on probable cause turns on the objective facts, and not on the subjective motivation of the searching officer, the court of appeals found that the issue here is the different one of whether the officers had consent to search respondent's residence for law enforcement purposes in the first place, *i.e.*, "whether the consent

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[3] The court of appeals acknowledged that "a true probation search can serve [the] ends" of deterring criminal activity by the probationer. App., *infra*, 13a. The court refused, however, to hold that the search in this case could be upheld as serving the same purposes. The court stated that to sustain the search on that basis would "indirectly eliminate our cases which rely on the difference between probation and investigation searches." *Ibid.*

covers what the officer did." App., *infra*, 11a. The court acknowledged that "the California Supreme Court disagrees with our *Whren* analysis." *Ibid.* (citing *People* v. *Woods*, 21 Cal. 4th 668, 677-681 (1999), cert. denied, 120 S. Ct. 1429 (2000)). It stated, however, that the California Supreme Court "does not control our reading of federal constitutional law, and for the reasons already stated, we find its analysis unpersuasive." *Ibid.*

REASONS FOR GRANTING THE PETITION

It is well established that searches based on consent are constitutionally permissible, without the need for a warrant or particularized cause. In this case, however, the court of appeals concluded that the Fourth Amendment prohibits law enforcement officers who are seeking evidence of criminal activity from searching based on the consent given by a California probationer to "[s]ubmit his * * * person, property, place of residence, vehicle, [and] personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer." The court of appeals thus reaffirmed a distinction in its cases between "probation" searches, which are permissible, and "investigation" searches, which are not. The court of appeals' holding is incorrect, and—as the court of appeals acknowledged—in conflict with the position of the Supreme Court of California, which has long upheld searches of adult probationers based on consent, without distinguishing between "probation" searches and "investigation" searches. The court of appeals' holding thus threatens to cause substantial disruption of law enforcement efforts in California, where state officers

are now operating under a dual system of inconsistent legal standards.

The court of appeals' holding warrants this Court's review. In *Pennsylvania Board of Probation & Parole* v. *Scott*, 524 U.S. 357 (1998), this Court invited the parties to brief and argue the question whether "a search of a parolee's residence [must] be based on reasonable suspicion to be valid under the Fourth Amendment where the parolee has consented to searches as a condition of his parole." 522 U.S. 992 (1997). The Court ultimately did not reach that issue in *Scott*, however, instead resolving the case on other grounds. Because the legal issue remains important, and because of the adverse practical consequences flowing from the court of appeals' decision, this Court's resolution of that question is now warranted.[4]

1. The court of appeals' holding in this case is the latest in a line of cases invalidating searches based on California "Fourth Waiver" consents, when the court of appeals has concluded that the search of the probationer was not carried out with a view towards rehabilitation but was instead an impermissible investigative search. "[W]e have long recognized," the court has stated, that "the legality of a warrantless

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[4] While *Scott* was pending before this Court, the government filed a petition for certiorari in *United States* v. *Ooley*, No. 97-1144, another case involving a California probation search conducted pursuant to the Fourth Waiver, and suggested that the petition be held pending the Court's decision in *Scott*. See 97-1144 Pet. at 5-6. After the Court issued its decision in *Scott* without reaching the consent issue, the Court denied certiorari in *Ooley*. See 524 U.S. 963 (1998). The Ninth Circuit's refusal to reconsider its rule in this case, and its continued conflict with decisions of the California Supreme Court, make clear that the issue warrants plenary review at this time.

search depends upon a showing that the search was a true probation search and not an investigation search." *United States* v. *Ooley*, 116 F.3d 370, 372 (9th Cir. 1997) (collecting cases), cert. denied, 524 U.S. 963 (1998). The Ninth Circuit's law in this area is further complicated by holdings that even a probation officer cannot make a valid probation search if he is in fact acting as a "stalking horse" for the police in a criminal investigation. See *United States* v. *Watts*, 67 F.3d 790, 793-794 (9th Cir. 1995) ("A probation officer acts as a stalking horse if he conducts a probation search on prior request of and in concert with law enforcement officers."), rev'd on other grounds, 519 U.S. 148 (1997) (per curiam).[5]

In invalidating the search in this case, the court of appeals at times implied that "investigation" searches do not fall within the scope of a probationer's consent.[6]

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[5] The "stalking horse" doctrine is particularly difficult to apply because the Ninth Circuit has made clear that "collaboration between a probation officer and police does not in itself render a probation search unlawful." *Watts*, 67 F.3d at 794. It has also stated that "the warrantless search of a probationer's home need not necessarily be initiated, conducted, or even supervised by a probation officer to qualify as a probation search." *Ooley*, 116 F.3d at 372. Yet it has also held that a probation search may be illegal if the probation officer approves the search as a "stalking horse" for the police, and that a probation officer acts as a "stalking horse" if he conducts a probation search "on prior request of and in concert with law enforcement officers." See *United States* v. *Richardson*, 849 F.2d 439, 441 (9th Cir.), cert. denied, 488 U.S. 866 (1988). The line-drawing required to implement those positions is thus subtle and unpredictable.

[6] See App., *infra*, 8a (prior Ninth Circuit decisions "have made it clear that [a probationer's] consent must be seen as limited to probation searches, and must stop short of investigation searches"); *id.* at 11a (the question in this case is "whether * * * there was consent to the search in the first place," and the answer "depends on whether the consent covers what the officer did").

That view, however, is irreconcilable with the language of the consent itself, in which respondent agreed without qualification to "[s]ubmit his * * * person, property, place of residence, vehicle, [and] personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer." C.A. E.R. 73; App., *infra*, 4a. There is no language in that consent that limits its scope to searches conducted for a particular reason. See *Florida* v. *Jimeno*, 500 U.S. 248, 251 (1991) ("The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?"). The court of appeals did not suggest otherwise. Such a construction of respondent's consent would, moreover, be squarely at odds with the California Supreme Court's consistent interpretation of a provision that is a standard term of probation in the State. See pp. 9-11, *infra*. The basis for the court of appeals' opinion, in fact, is its legal conclusion that a probationer's consent to a search for *investigatory* purposes is invalid and unenforceable as a matter of Fourth Amendment law. See App., *infra*, 8a ("We simply have refused to recognize the viability of a more expansive probationary consent to search term.").

That analysis of Fourth Amendment law is in square conflict with decisions of the Supreme Court of California. "For nearly three decades, [the Supreme Court of California] has upheld the legality of searches authorized by probation terms that require probationers to submit to searches of their residences at any time of the day or night by any law enforcement officer with or without a warrant." *People* v. *Woods*, 21 Cal. 4th 668, 675 (1999), cert. denied, 120 S. Ct. 1429 (2000); see

People v. *Robles*, 23 Cal. 4th 789, 795 (2000) ("In California, a person may validly consent in advance to warrantless searches and seizures in exchange for the opportunity to avoid serving a state prison term.").[7] In *People* v. *Bravo*, 43 Cal. 3d 600 (1987), cert. denied, 485 U.S. 904 (1988), the court explained that a consent search of a probationer's residence is valid because "[a] probationer consents to the waiver of his Fourth Amendment rights in exchange for the opportunity to avoid service of a state prison term." *Id.* at 608. The court thus upheld a search by law enforcement officers who were acting on a tip that the probationer was involved in the sale of narcotics. *Id.* at 602-603. The court made clear that the consent authorized searches to fulfill "the rehabilitative and reformative purposes of probation *or other legitimate law enforcement purposes*." *Id.* at 610 (emphasis added).[8]

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[7] In *Robles*, the court held that a probationer's prior consent to searches of his residence did not validate a search where (a) the searching officers were unaware of the probation condition at the time they executed the search, and (b) the purpose and effect of the search was to obtain evidence of wrongdoing by the probationer's brother, who shared the residence. See 23 Cal. 4th at 794-800. The court distinguished *Woods* as a case "which concerned the legality of a home search premised upon a known probation condition." *Id.* at 797. In this case, the officer who conducted the search of respondent's apartment submitted a declaration attesting that he was aware of respondent's probationary status and the attendant search condition before he performed the search. C.A. E.R. 49-50.

[8] In assessing the validity of Fourth Waiver searches of adult probationers, the California Supreme Court has explicitly relied on a consent rationale. See *Woods*, 21 Cal. 4th at 674-676. In contrast, where particular offenders are not offered the opportunity to decline release—such as parolees and juvenile probationers—the California Supreme Court has not relied on a consent theory in upholding warrantless searches without particularized cause. The Court has instead sustained the searches on the theory that such persons have a reduced expectation of privacy in light of the conditional nature of their release, and that the interest in maintaining close supervision of such persons justifies the intrusions in question. See *In re Tyrell J.*, 8 Cal. 4th 68, 81-90 (1994) (juvenile probationers), cert. denied, 514 U.S. 1068 (1995); *People* v. *Reyes*, 19 Cal. 4th 743, 747-754 (1998) (adult parolees), cert. denied, 526 U.S. 1092 (1999).

The court of appeals' decision in this case cannot be reconciled with *Woods*, *Bravo*, and other decisions of the California Supreme Court holding that a criminal defendant's acceptance of a probation search condition constitutes a valid and enforceable consent to the search of all areas subject to the probationer's control. In particular, the California Supreme Court has specifically rejected the contention that a search based on such a consent is invalid if the searching officer is motivated by a desire to investigate possible criminal activity. In *Woods*, for example, the court accepted, as supported by substantial evidence, the trial court's finding that the searching officer's "sole reason for searching the [probationer's] residence was to discover evidence against [the probationer's boyfriend] and not to investigate whether [the probationer] had violated her probation." 21 Cal. 4th at 674. The court nevertheless held that the search was authorized by the consent that the probationer had given as a condition of release on probation. *Id.* at 674-682.

The court in *Woods* concluded that a focus on the subjective intent of the searching officer was inconsistent with this Court's decision in *Whren* v. *United States*, 517 U.S. 806 (1996). See 21 Cal. 4th at 678-680. It explained "whether the purpose of the search is to

monitor the probationer or to serve some other law enforcement purpose, or both, the search in any case remains limited in scope to the terms articulated in the search clause and to those areas of the residence over which the probationer is believed to exercise complete or joint authority." *Id.* at 681. "Given such constraints," the court concluded, "there is little to be advanced by validating a search merely upon the searching officer's ability to convincingly articulate the proper subjective motivation for his or her actions." *Ibid.* The conflicting positions of the California Supreme Court and the Ninth Circuit with respect to the relevance of the searching officer's purpose merits this Court's review.

2. The court of appeals' decision is incorrect.

a. As a general matter, "a search conducted pursuant to a valid consent is constitutionally permissible," *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 222 (1973), and the validity of the search does not turn on the officers' possession of either individualized suspicion or a warrant. Accord, *e.g.*, *Illinois* v. *Rodriguez*, 497 U.S. 177, 181 (1990). More generally, "[a] criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution." *United States* v. *Mezzanatto*, 513 U.S. 196, 201 (1995); see also *Peretz* v. *United States*, 501 U.S. 923, 936 (1991) ("The most basic rights of criminal defendants are * * * subject to waiver.").

Those principles are applicable here. This Court has recognized that an individual may, within broad limits, enter into arrangements with the government under which the individual relinquishes constitutional rights in return for a promise of favorable treatment. So long as the individual is accurately apprised of the options available to him, such agreements are generally

enforceable even when the individual is forced to choose between unattractive alternatives.

That principle is demonstrated most vividly by this Court's repeated recognition that the government may attempt through negotiation to persuade a defendant to plead guilty to a criminal charge. See, *e.g.*, *Mezzanatto*, 513 U.S. at 209-210 ("The plea bargaining process necessarily exerts pressure on defendants to plead guilty and to abandon a series of fundamental rights, but we have repeatedly held that the government may encourage a guilty plea by offering substantial benefits in return for the plea.") (internal quotation marks omitted); *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363 (1978) ("acceptance of the basic legitimacy of plea bargaining necessarily implies rejection of any notion that a guilty plea is involuntary in a constitutional sense simply because it is the end result of the bargaining process"; defendant's plea held to be voluntary even though it "may have been induced * * * by fear of the possibility of a greater penalty upon conviction after a trial"); *Brady* v. *United States*, 397 U.S. 742, 755 (1970) ("[A] plea of guilty is not invalid merely because entered to avoid the possibility of a death penalty.").

Much the same analysis applies where an individual has consented to future searches in order to obtain release on probation. In *Griffin* v. *Wisconsin*, 483 U.S. 868 (1987), this Court observed that "[p]robation is simply one point (or, more accurately, one set of points) on a continuum of possible punishments ranging from solitary confinement in a maximum-security facility to a few hours of mandatory community service." *Id.* at

874.[9] If respondent could have validly entered into a plea agreement providing for confinement in a particular penal institution, there is no reason that he could not also bargain for a less onerous punishment—*i.e.*, release into the community on condition that his residence could be searched at any time. Indeed, enabling defendants to consent to such search terms may further their long-term interests in choosing a less onerous form of supervision. Compare *Bravo*, 43 Cal. 3d at 609 ("Were we to conclude that a probationer's waiver of Fourth Amendment rights were either impermissible or limited to searches conducted only upon a reasonable-suspicion standard, the opportunity to choose probation might well be denied to many felons by judges whose willingness to offer the defendant probation in lieu of prison is predicated upon knowledge that the defendant will be subject to search at any time for a proper probation or law enforcement purpose.").

b. "Under the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right * * * in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the" right whose waiver is at issue. *Dolan* v. *City of Tigard*, 512 U.S. 374, 385 (1994). This Court's unconstitutional conditions jurisprudence suggests that a State may not condition an individual's

[9] In *Griffin*, this Court upheld a warrantless search of a probationer's house based on a state regulation that permitted such searches where "reasonable grounds" existed to believe that contraband would be found. The Court did not adopt a "reasonable grounds" (or other individualized suspicion) requirement as a constitutional floor, and it did not consider whether a person released on probation could validly consent to searches without individualized suspicion as a condition of release.

release on probation upon his agreement to forgo the exercise of a constitutional right—*e.g.*, the First Amendment right to engage in religious observance, or to make public statements critical of the government—that is wholly unrelated to his status as a probationer.

A requirement that probationers consent to search, by contrast, directly furthers the State's interest in the effective administration of its probation system. Probationers present a heightened risk of committing further criminal or other antisocial acts, thus justifying close monitoring and supervision. See *Griffin*, 483 U.S. at 880 ("it is the very assumption of the institution of probation that the probationer is in need of rehabilitation and is more likely than the ordinary citizen to violate the law"). The purpose of conditional release is to assist in the probationer's reintegration into the community, while minimizing the threat to the public safety and welfare that release may entail. A search designed to assess the probationer's compliance with the conditions of his release, including the condition of not violating the criminal law, is therefore reasonably related to the benefit offered by the government as a quid pro quo.

c. A probationer's consent to search given as a condition of release is not rendered involuntary by the fact that the alternative is incarceration. It has been suggested that a potential probationer or parolee has no choice but to accept a consent to search provision.[10]

[10] See, *e.g.*, 4 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 10.10(b), at 764-765 (3d ed. 1996) ("to speak of consent in this context is to resort to a manifest fiction, for the probationer who purportedly waives his rights by accepting such a condition has little genuine option to refuse") (citation and internal quotation marks omitted); *Commonwealth* v. *Walter*, 655 A.2d 554, 556 n.1 (Pa. Super. Ct. 1995) ("Needless to

That suggestion appears to rest on one of two propositions. First is the notion that an individual would not, under any circumstances, make a voluntary decision to accept a prison term. That proposition is demonstrably false: criminal defendants can and often do enter into plea agreements that provide for substantial periods of incarceration, generally because they conclude that their alternatives are even more unattractive. This Court has repeatedly recognized that a plea of guilty is not rendered involuntary simply because it is motivated by a desire to avoid greater punishment. See p. 13, *supra*.

Alternatively, the view that a probationer lacks any true choice in the matter may rest instead on the perception that no one would choose to spend time in prison *in preference to release on probation* because probation, even with a consent-to-search condition, is substantially less onerous than incarceration. That reasoning is also flawed. The government cannot be said to coerce an individual simply by presenting him with a choice in which one of the alternatives is plainly more advantageous than the other. No one would suggest, for example, that a defendant's guilty plea is involuntary if the government offers him a favorable plea agreement. In short, no legal principle supports the view that an individual's waiver of constitutional rights is rendered unenforceable whenever the benefits of that waiver substantially outweigh its costs.

d. The court of appeals acknowledged both that "a person can consent to a search of his home," and that respondent "did consent to searches when he agreed to

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say, there is no bargaining for terms of parole, nor is it likely that any prisoner is going to refuse parole simply because the terms are unfavorable.").

the terms of his probation." App., *infra*, 7a-8a. The court held, however, that respondent's "consent must be seen as limited to probation searches, and must stop short of investigation searches. We simply have refused to recognize the viability of a more expansive probationary consent to search term." *Ibid.* The court of appeals' effort to distinguish between "probation" and "investigation" searches is misguided.

In *Whren* v. *United States*, 517 U.S. 806 (1996), this Court observed that it had consistently "been unwilling to entertain Fourth Amendment challenges based on the actual motivation of individual officers." *Id.* at 813. The Court explained that the "principal basis" for its refusal to consider the subjective motivation of the searching or seizing officer "is simply that the Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent." *Id.* at 814. See also *Bond* v. *United States*, 529 U.S. 334, 338 n.2 (2000) (in determining whether an officer's actions constitute a "search," "the issue is not [the officer's] state of mind, but the objective effect of his actions").[11]

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[11] In *City of Indianapolis* v. *Edmond*, 121 S. Ct. 447 (2000), the Court held that a traffic checkpoint violates the Fourth Amendment when its "primary purpose" is to serve general criminal law enforcement interests in interdicting narcotics. *Id.* at 458. The Court explained that, in contrast to cases such as *Whren* and *Bond*, "our cases dealing with intrusions that occur pursuant to a general scheme absent individualized suspicion have often required an inquiry into purpose at the programmatic level." *Id.* at 457. The Court noted that "subjective intent was irrelevant in *Bond* because the inquiry that our precedents required focused on the objective effects of the actions of an individual officer." *Ibid.* This Court's consent-search precedents similarly focus on objective considerations, both in analyzing the scope of consent, see *Florida* v. *Jimeno*, *supra*, and in determining the reasonableness of an

The seizure in *Whren* was based on probable cause to believe that a traffic violation had been committed, 517 U.S. at 810, and the Court explained that the existence of probable cause ordinarily obviates the need for the sort of Fourth Amendment "balancing" process that might be necessary in other contexts, see *id.* at 817-819. A property owner's voluntary consent to search should lead to a similar Fourth Amendment conclusion: the search is valid if it is within the scope of the consent, regardless of a particular searching officer's motive or purpose. The intrusion is the same regardless of purpose, and nothing in this Court's decisions suggests that the propriety of a consent search depends on the searching officer's subjective motivation in requesting or acting upon the consent.

The purported distinction between "probation" and "investigation" searches is particularly unsound. The most fundamental term of probation is that an individual must refrain from committing further crimes. Where the probationer is suspected of additional criminal activity, a search designed to confirm or dispel that suspicion directly serves an important probation purpose. As the Court in *Griffin* explained, restrictions on a probationer's liberty "are meant to assure that the probation serves as a period of genuine rehabilitation and that the community is not harmed by the probationer's being at large. These same goals require and justify the exercise of supervision to assure that the

officer's reliance on consent, see *Illinois* v. *Rodriguez*, *supra*. The objective approach of *Whren* and *Bond* is therefore applicable here.

restrictions are in fact observed." 483 U.S. at 875 (citation omitted).[12]

The court of appeals appeared to acknowledge that a probation search may be based *in part* on the desire to detect wrongdoing, but suggested that any search directed *only* at that goal (rather than at the rehabilitation of the probationer) cannot be regarded as a legitimate probation search. App., *infra*, 10a. That conclusion is without basis. Even where a search is conducted solely to determine whether a probationer has abused the "conditional liberty" (*Griffin*, 483 U.S. at 874) that the State has chosen to allow him, the search helps to ensure "that the community is not harmed by the probationer's being at large" (*id.* at 875) and thereby directly serves a core probation purpose. Cf. *New York* v. *Burger*, 482 U.S. 691, 712-713 (1987) (search intended to ensure that automobile junkyard

[12] In *Robles*, the Supreme Court of California stated that "searches that are undertaken pursuant to a probationer's advance consent must be reasonably related to the purposes of probation." 23 Cal. 4th at 797. The court concluded that "a search of a particular residence cannot be 'reasonably related' to a probationary purpose when the officers involved do not even know of a probationer who is sufficiently connected to the residence." *Ibid.* The court did not suggest, however, that searches intended to confirm or dispel suspicion of a probationer's wrongdoing are insufficiently related to the purposes of probation to fall within the scope of a probationer's consent. To the contrary, it observed that "[w]arrantless searches are justified in the probation context because they aid in deterring further offenses by the probationer and in monitoring compliance with the terms of probation." *Id.* at 795; see *id.* at 797 (explaining the court's prior holding in *Woods* "that, regardless of the searching officer's ulterior motives, the circumstances presented ample justification for a search pursuant to the probation clause at issue because the facts known to the officer showed a possible probation violation.").

did not facilitate automobile theft was a valid administrative search, notwithstanding the fact that the ultimate purpose of the administrative scheme paralleled that of the State's penal laws).

3. The Ninth Circuit's rule warrants this Court's review. The conflict between the Fourth Amendment standards announced by the state and federal courts in California means that evidence that is constitutionally admissible in state prosecutions must be excluded in federal prosecutions. The Ninth Circuit's rule therefore places state and local law enforcement officers in the most populous State in the Nation in the intolerable position of having to choose between following long-settled Fourth Amendment rulings of the state courts or those of the Ninth Circuit. The Ninth Circuit's rule suffers from the further complication that, even if state officers sought to comply with it, the involvement of law enforcement officers in a "probation" search may taint the entire search if the court concludes that the probation department was a "stalking horse" for law enforcement. See note 5, *supra*. And, to the extent that the Ninth Circuit's position means that evidence gathered in a probation search cannot be introduced in a federal prosecution, the conflict hinders efforts of federal and state authorities to engage in cooperative law enforcement.

The court of appeals' decision has additional ramifications for state law enforcement officers who may face damages actions under 42 U.S.C. 1983 (1994 & Supp. IV 1998). The doctrine of qualified immunity protects officers against damages liability for conduct that was objectively reasonable under prevailing law. *Wilson* v. *Layne*, 526 U.S. 603, 614 (1999) (whether personal liability may be assessed "generally turns on the objective legal reasonableness of the action, assessed in light

of the legal rules that were clearly established at the time it was taken") (internal quotation marks omitted). In this case, however, the court of appeals stated that "[f]or at least three decades, it has been the law of this circuit that subterfuge probation searches are unconstitutional." App., *infra*, 12a-13a. That statement raises the prospect that, if state law enforcement officers are sued for damages in federal court under Section 1983 based on their participation in Fourth Waiver searches, they could be held to lack qualified immunity from suit, notwithstanding the California Supreme Court's repeated holdings that searches are consistent with the Fourth Amendment. Law enforcement officers should not be subject to pressures created by such conflicting legal regimes.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 2001

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 99-10538

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

MARK JAMES KNIGHTS; STEVEN SIMONEAU,
DEFENDANTS-APPELLEES

[Argued and Submitted July 11, 2000]
[Filed Aug. 3, 2000]

Before: CANBY, REINHARDT, and FERNANDEZ, Circuit Judges.

FERNANDEZ, Circuit Judge:

The United States appeals from an order which suppressed evidence seized from the home of Mark James Knights in a warrantless search conducted by members of the Sheriff's Department of Napa County, California. It claims that the evidence was properly seized during a probation search. The district court disagreed; so do we. We affirm.

BACKGROUND

From 1996 on, Pacific Gas and Electric Company's facilities in Napa County had been subjected to vandalism over 30 times. Those incidents included short circuits caused by throwing chains onto transformers, damaging of gas power switches, and damaging of power pole guy wires. Suspicion had focused on Knights, and on his friend, Steven Simoneau. Many things contributed to that. In the first place, those vandalisms started after Knights' electrical services had been discontinued in March of 1996 because he not only did not pay his bill, but also had found a way to steal services by bypassing PG & E's meter. Detective Todd Hancock of the Sheriff's Department also thought it noteworthy that incidents of vandalism of PG & E property seemed to coincide with Knights' court appearance dates regarding the theft of PG & E services.

More than that, on May 24, 1998, Knights and Simoneau were stopped by a sheriff's deputy near a PG & E gas line. They could not explain their presence in the area to the deputy, who observed that Simoneau's pick-up truck contained pipes, pieces of chain, tools, and gasoline. The deputy asked to search the vehicle, but was refused permission. A few days later, a pipe bomb was detonated against the exterior of a building where a burglary had taken place. That building was not far from Knights' residence.

For our purposes, the final incident occurred on the morning of June 1, 1998. Some miscreant, or miscreants, had managed to knock out telephone service to the Napa County Airport by breaking into a Pacific Bell

telecommunications vault and setting fire to it. Brass padlocks which secured the vault and an adjacent PG & E power transformer had been removed, and a gasoline accelerant had been used to ignite the fire. Within a short time after that incident occurred, a sheriff's deputy drove by Knights' residence and observed Simoneau's truck parked in front. The deputy got out of his patrol car and felt the hood of Simoneau's truck. It was still warm at the time, which suggested that Knights and Simoneau might have been involved in the vandalism. The investigation focused even more purposefully upon them as a result.

Thus, on June 3, 1998, Hancock set up surveillance of Knights' apartment. At approximately 1:45 a.m., Knights and Simoneau arrived at the apartment in Simoneau's pick-up truck. The two proceeded to enter the apartment where they remained with the lights on until about 3:10 a.m. At that point, Simoneau emerged from the apartment carrying three cylindrical items cradled in his arms. On the basis of his training, Hancock believed those to be pipe bombs. Simoneau walked to the truck, placed an object shaped like a jar in the back of it, and then walked across the street to the bank of the Napa River, where he disappeared from view. Hancock then heard three splashes as Simoneau, seemingly, deposited those objects in the river. Simoneau returned to the truck without the cylinders, picked up a glass jar from the truck bed and wiped it with a cloth. He then climbed into that truck and departed.

Hancock trailed Simoneau until he stopped in a driveway. When Hancock entered the driveway Simoneau was not around, but Hancock discovered a number of

suspicious objects in and about the truck. In the bed of the truck were a Molotov cocktail and explosive materials. Also, a gasoline can and two brass padlocks, which seemed to fit the description given by PG & E investigators of the locks removed from the Pacific Bell and PG & E transformer vault two days earlier, were observed. The truck was seized, impounded, and later searched pursuant to a warrant.

With all of that information in hand, Hancock decided that he would conduct a warrantless "probation" search of Knights' home. As Hancock saw it, he did not need to obtain a warrant because at an earlier time Knights had been placed on summary probation after he was convicted of a state misdemeanor drug offense. A person on summary probation in California is not under the direct supervision of a probation officer.[1] However, in this case, a term of that probation required Knights to "[s]ubmit his . . . person, property, place of residence, vehicle, personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer." Relying upon that and the authorization of his supervisor, Hancock proceeded.

He began to organize the search at about 5:00 a.m. that morning, and conducted it at 8:00 a.m. after breaking through a door and entering the apartment where Knights was still abed. The search was productive. It turned up detonation cord, ammunition, unidentified liquid chemicals, instruction manuals on chemistry and electrical circuitry, bolt cutters, telephone pole-

[1] *See People v. Soto*, 166 Cal.App.3d 770, 774 n. 3, 212 Cal.Rptr. 696, 699 n. 3 (1985).

climbing spurs, drug paraphernalia, photographs and blueprints stolen from the burglarized building, and a brass padlock stamped PG & E. Needless to say, Knights was arrested.

Ultimately, Knights found himself in federal court because he was indicted for conspiracy to commit arson, for possession of an unregistered destructive device, and for being a felon in possession of ammunition. *See* 18 U.S.C. §§ 371, 922(g); 26 U.S.C. § 5861(d). He moved to suppress the evidence seized in the June 3, 1998, search, and the government asserted that it was conducted pursuant to a probation consent. The district court agreed with Knights that the claimed probation search was really a subterfuge for an investigative search and ordered suppression. This appeal followed.

STANDARD OF REVIEW

A district court's determination of whether there was consent to search is generally treated as a factual determination, but we have said that in "determining whether as a general rule certain types of actions give rise to an inference of consent, de novo review is appropriate." *United States v. Shaibu*, 920 F.2d 1423, 1425 (9th Cir. 1990). The district court's conclusion that the probation search of Knights' apartment was a subterfuge for a criminal investigation is a factual determination which we review for clear error. *See United States v. Watts*, 67 F.3d 790, 793-94 (9th Cir. 1995), *rev'd on other grounds*, 519 U.S. 148, 117 S. Ct. 633, 136 L.Ed.2d 554 (1997).

DISCUSSION

The difficulties at the interface between a person's right to the security of his home and the needs of law enforcement are sempiternal. Nonetheless, the balance is weighted in favor of the home dweller for reasons with a weighty ancient lineage. Coke's Reports reflect that: "the house of every one is to him as his . . . castle and fortress, as well for his defence against injury and violence, as for his repose. . . ." *Semayne's Case* 5 Coke's Rep. 91a, 91b (K.B.1603). That meant not only that a person could defend his home against miscreants, but also that the King's officers were required to give proper notice before entry and had to enter in accordance with the law. *See id.* at 91b-92a. Sir Matthew Hale, who died in 1676, also emphasized that "every man by the law hath a special protection in reference to his house and dwelling." 1 Matthew Hale, Pleas of the Crown 547 (1736). And we read in Wood's Institutes that a sheriff cannot break into a home without first giving proper notice, and signifying the cause. *See* Thomas Wood, An Institute of the Laws of England 71 (1734). More than that, "[i]f a Justice of Peace makes a Warrant upon a bare Surmise, and by Virtue thereof One breaks a House . . . It is against Magna Charta." *Id.* at 615. Finally, as Blackstone said: "the law of England has so particular and tender a regard to the immunity of a man's house, that it styles it his castle, and will never suffer it to be violated with impunity; agreeing herein with the sentiments of antient Rome. . . ." 4 William Blackstone, Commentaries *223 (1765).

But venerable as they are, we need not depend solely on the words of English judges and lawyers for our protections. The Fourth Amendment carried forward and burnished the principles upon which they relied when it commanded that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated. . . ." As Justice Story has told us, that amendment "seems indispensable to the full enjoyment of the rights of personal security, personal liberty, and private property. It is little more than the affirmance of a great constitutional doctrine of the common law." *See* Joseph Story, Commentaries on The Constitution of the United States, § 1902 (2nd ed. 1851). That was echoed and elaborated upon by the redoubtable Thomas M. Cooley, who wrote: "[E]very man's house is his castle. The meaning of this is that every man under the protection of the laws may close the door of his habitation, and defend his privacy in it, not against private individuals merely, but against the officers of the law and the state itself." Thomas M. Cooley, The General Principles of Constitutional Law 218 (1891). We have often said much the same thing. *See, e.g., United States v. Becker*, 23 F.3d 1537, 1539-40 (9th Cir. 1994); *see also Wilson v. Layne*, 526 U.S. 603, 609-13, 119 S. Ct. 1692, 1697-98, 143 L.Ed.2d 818 (1999).

Of course, there can be no doubt that a person can consent to a search of his home, although we carefully scrutinize claims that he has done so. *See Shaibu*, 920 F.2d at 1425-26. There also can be little doubt that Knights did consent to searches when he agreed to the

terms of his probation.[2] But we have made it clear that his consent must be seen as limited to probation searches, and must stop short of investigation searches. We simply have refused to recognize the viability of a more expansive probationary consent to search term. That was illustrated in 1985, when we were faced with a California probationer who had not had supervision services commenced and at whose home a supposed probation search was conducted. *See Merchant*, 760 F.2d at 965. We had this to say after we reviewed the record:

> The facts show that none of the law enforcement officers reasonably could have believed that the search related to the interests of effective probation supervision. There is no showing that the state ever made any efforts toward rehabilitating Merchant. He did not receive supervision or counseling. In fact, he was never even assigned a probation officer.
>
> The search was conducted because the assistant district attorney had received reports of gunfire on Merchant's property. . . .

[2] The government suggests that we have never explicitly said that a probationer has consented to a search term. But we have, in effect, deemed that the search term is consented to—accepted—by the probationer when he is placed upon probation, and we have not questioned the binding effect of that consent. So, we have stated that a defendant's probation was "conditioned . . . on his consent" to a search term. *United States v. Merchant*, 760 F.2d 963, 964 (9th Cir. 1985). We have also described the limits of a probation search term to which, as the government there argued, the defendant had "consented" as a "condition of his probation." *United States v. Ooley*, 116 F.3d 370, 371 (9th Cir. 1997).

> These facts strongly suggest that the search was a subterfuge for conducting a criminal investigation. We have condemned the practice of using a search condition imposed on a probationer as a broad tool for law enforcement. Because the search here clearly was not a genuine attempt to enforce probation but apparently had a motive of avoidance of Fourth Amendment requirements, it is the type of law enforcement conduct that ought to be deterred. Consequently, the exclusionary rule applies with full force.

Id. at 969 (citations omitted).

That was not an unusual holding. Rather, it was one of a long line of cases. So, over ten years later we dealt with the same sort of situation. *See Ooley*, 116 F.3d at 372. There, too, a California probationer, with a consent to search term like the one in this case, claimed that a search by state law enforcement officers was merely a subterfuge. *Id.* at 372. We said, "[w]ith respect to probationers, we have long recognized that the legality of a warrantless search depends upon a showing that the search was a true probation search and not an investigation search." *Id.* And, we added, "[u]nlike an investigation search, a probation search should advance the goals of probation, the overriding aim of which 'is to give the [probationer] a chance to further and to demonstrate his rehabilitation while serving a part of his sentence outside the prison walls.'" *Id.* (citation omitted); *see also United States v. Johnson*, 722 F.2d 525, 527-28 (9th Cir. 1983); *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 266-67 (9th Cir. 1975) (en banc); *cf. Smith v. Rhay*, 419 F.2d 160, 162-63 (9th Cir. 1969) (parole term).

Here, the district court's determination that the purpose of the Sheriff's Department was the investigation of Knights and the termination of his nefarious career, rather than a probation search, was not clearly erroneous. Indeed, it was an almost ineluctable conclusion. Detective Hancock, and his cohorts, were not a bit interested in Knights' rehabilitation. They were interested in investigating and ending the string of crimes of which Knights was thought to be the perpetrator. That string began long before his summary probation started. In fact, his probation started just three days before the last incident. True, a probation officer may also wish to end wrongdoing by a probationer, but there was no "also" about Detective Hancock's purpose. He was performing his duty as a law enforcement officer and had drawn some very good inferences from the facts, but he was using the probation term as a subterfuge to enable him to search Knights' home without a warrant. In so doing, he crossed the frontier that separates citizen privacy from official enthusiasm. The subterfuge will not work. That would seem to bring this opinion to a logical close, but we must pause to consider a number of arguments against this result.

The government first asserts that the Supreme Court severely undercut our probation search jurisprudence when it issued *Whren v. United States*, 517 U.S. 806, 116 S. Ct. 1769, 135 L.Ed.2d 89 (1996). In fact, says the government, our jurisprudence is so weakened that this panel should give it the slight tap that will send it crashing to the ground. We will not do that for at least two reasons beyond pure principle. In the first place, we have reiterated our rule since *Whren* was decided. *See Ooley*, 116 F.3d at 372. Secondly, the government's

argument turns on the notion that the subjective purposes of the officers should not be considered if, objectively, a probation officer could have conducted a probation search. That argument is based upon the holding of *Whren* that the reasonableness of traffic stops with probable cause does not depend upon the subjective intentions of the officers. *See Whren*, 517 U.S. at 813, 116 S. Ct. at 1774. That form of argument is far off target when applied in the context at hand. Here the issue is not whether a search or seizure with probable cause should be invalidated because of an officer's subjective intentions. It is, rather, whether, without another basis for a warrantless home search, there was consent to the search in the first place. That is a different question entirely. It depends on whether the consent covers what the officer did. *See United States v. Woodrum*, 202 F.3d 1, 12-13 (1st Cir.), *petition for cert. filed*, 69 U.S.L.W. 3087 (U.S. June 22, 2000) (No. 00-60). We recognize that the California Supreme Court disagrees with our *Whren* analysis. *See People v. Woods*, 21 Cal. 4th 668, 677-81, 981 P.2d 1019, 1025-27, 88 Cal.Rptr.2d 88, 94-97 (1999). But, then, that court does not control our reading of federal constitutional law, and for the reasons already stated, we find its analysis unpersuasive.[3] However, mention of that case does lead to another of the government's arguments.

The government asserts that in order to avoid confusing state law enforcement officers we should accept

[3] We note that three of the court's seven justices were of the same mind and vigorously dissented. *See Woods*, 21 Cal.4th at 682, 981 P.2d at 1028, 88 Cal. Rptr. 2d at 98 (Kennard, J., dissenting); *id.* at 683, 981 P.2d at 1029, 88 Cal. Rptr. 2d at 98 (Brown, J., dissenting).

the fruits of their search, even if we think that the search was unconstitutional under the United States Constitution. We think not. While state court rulings, especially on questions of state law, may be of interest, they do not determine the legality of a search for Fourth Amendment purposes. *See Ooley*, 116 F.3d at 372. Application of the exclusionary rule regarding searches does not ordinarily turn on state law, even if the state courts would take a more stringent view. *See United States v. Cormier*, 220 F.3d 1103 (9th Cir. 2000); *United States v. Mota*, 982 F.2d 1384, 1387 (9th Cir. 1993); *see also id.* at 1389 (Fernandez, J., concurring). More to the purpose, accepting the government's argument would amount to the recrudescence of the silver platter doctrine. But that platter was melted down by the Supreme Court in *Elkins v. United States*, 364 U.S. 206, 208, 80 S. Ct. 1437, 1439, 4 L.Ed.2d 1669 (1960), where the Court rejected the idea that the fruits of a search by state officers which would be unconstitutional if conducted by federal officers could be introduced in a federal criminal trial. We will not refabricate that platter.

The government passingly makes the argument that the officers relied in good faith on California law, and, therefore, suppression should not follow. We have previously rejected just that kind of argument in this context. *See Merchant*, 760 F.2d at 968-69. At any rate, the officers were not trapped into relying on some state law or ordinance which was later found to be unconstitutional. *See Illinois v. Krull*, 480 U.S. 340, 349-50, 107 S. Ct. 1160, 1167, 94 L.Ed.2d 364 (1987); *cf. Grossman v. City of Portland*, 33 F.3d 1200, 1209-10 (9th Cir. 1994). For at least three decades, it has been the law of this circuit that subterfuge probation searches are unconstitutional. Perhaps the California courts will admit the fruits of the search of Knights' residence; we will not.

Finally, argues the government, the purposes of a probation search were served because Knights was supposed to "obey all laws," was deterred by the search from being a threat to the community, and was further deterred from engaging in further criminal activity. No doubt a true probation search can serve those ends. Then, too, so does an investigative search. In fine, with its aduncous argument the government hopes to indirectly eliminate our cases which rely on the difference between probation and investigation searches. It cannot.[4]

CONCLUSION

As we enter the 21st Century, citizens find the very notion of privacy under almost relentless assault. Random suspiciousness taking and testing of body fluids proliferates on ever more flimsy grounds; motor vehicle departments sell information about those who are forced to give it in order to obtain driver's licenses; banks use private account information for other purposes and provide it to other related entities; when a consumer visits a website, a spy is placed in his computer; it has become easier to invade homes without knocking and giving notice; and on and on. In this climate, it is easy to develop callouses on our sense of privacy. Perhaps it even seems quaint to worry much

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[4] The government also suggests that because it could have obtained a warrant, it did not have to do so. To state that proposition is to refute it. *See United States v. Mejia*, 69 F.3d 309, 319-20 (9th Cir. 1995).

about the sanctity of a home where we can speak, listen, read, write and think in privacy. Perhaps it seems even more quaint to worry about "[a] probationer's home [which], like anyone else's, is protected by the Fourth Amendment's requirement that searches be 'reasonable.'" *Griffin v. Wisconsin*, 483 U.S. 868, 873, 107 S. Ct. 3164, 3168, 97 L.Ed.2d 709 (1987). But worry we must, and do.

We now reiterate our insistence that even when a probationer has consented to searches of his home as a condition of his probation, those searches must be conducted for probation purposes and not as a mere subterfuge for the pursuit of criminal investigations. In making this decision we need not rely on some resident numen or wait for Fulgora to light our way. We can, instead, rely upon the wisdom of the ages and upon the sagacity of the numerous Ninth Circuit judges who have written before us. If we do-not heed all of that history and learning, who will?

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE MARTIN J. JENKINS

No. CR-99-0108 MJJ

UNITED STATES OF AMERICA, PLAINTIFF

v.

MARK KNIGHTS; STEVEN SIMONEAU, DEFENDANTS

SAN FRANCISCO, CALIFORNIA
MONDAY, NOVEMBER 1, 1999

TRANSCRIPT OF PROCEEDINGS

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DEPUTY WOZNIAK: Calling Criminal 99-0108, *United States of America v Mark Knights*; *United States of America v. Steven Simoneau.* Attorneys, please state your appearance for the record.

MS. BOERSCH: Good afternoon, Your Honor. Martha Boersch for the United States.

THE COURT: Good to see you.

MS. FOX: Good afternoon. Hillary Fox on behalf of Mark Knights.

THE COURT: Good afternoon. Mr. Thompson, good to see you.

MR. THOMPSON: James Thompson appearing on behalf of Mr. Simoneau, who's present in court, Your Honor.

MS. FOX: Mr. Knights is present as well.

THE COURT: Okay. The record should reflect that all counsel are present; all parties are present. You may all have a seat. The Court had the matters added to calendar to issue its decision with respect to the motions that are pending before the Court, and the Court will do that. With respect to the motion to suppress filed on behalf of Mr. Simoneau, the Court finds as follows.

First, with respect to the June 3rd search of Mr. Simoneau's pickup truck, there were several issues posited to the Court. The Court notes that the Government raised the issue of standing as to the matter, and certainly as a variant in terms of the expectation of pri[v]acy that Mr. Thompson relays, the issue of whether or not the vehicle was parked with the protections afforded by the Fourth Amendment attached.

Having reviewed the record in the matter, the Court finds that the—certainly ostensibly there is—at least there was tacit permission for the positioning of the vehicle on the roadway. And that raises a factual nexus with respect to standing. However, the Court finds that the record does not support a finding that the area where the truck was parked is within a curtilage of the homes such that its afforded protections under the Fourth Amendment.

I reached this conclusion for several reasons, including resolution of factual issues in contention. First,

with respect to the credibility issue, the testimony of Mr. Simoneau and Detective Hancock, I find that Detective Hancock was credible in this matter; I also find that Mr. Simoneau was not.

First, I find that Mr. Simoneau's testimony regarding the objects that he threw into the river, characterized as stale baguettes, was implausible for a number of reasons. One, the manner in which he carried such objects, even by his accounting, with one hand, were cradled in a way that to the Court seems inconsistent and defies common sense. The manner in which these baguettes, according to Mr. Simoneau, were carried are suggestive of greater weight and density than what would be stale bread. Moreover, the time of night that he opines that he was seeking to feed ducks. And the splashes of each of the items were sufficiently loud enough for Detective Hancock to have heard them with his naked ear from a hundred feet away.

The Court posits its credibility findings with respect to Detective Hancock and Mr. Simoneau, finding the latter not credible, is based on more than just what the Court has just recited. I find that Mr. Simoneau's testimony, specifically that he did not recall if he told Ms. O'Connor that he was involved in an accident when asked a pointed question—the "I don't recall" answer, in this Court's view, was suggestive of shaping testimony at least in a way that—the Court finds that such recall and absence of recall in a time frame where there has just been an accident and he's been ordered by an officer to remain present, that did he not recall whether he had told Miss O'Connor that he was in an accident or that an accident occurred, in the Court's view, does not

support a finding that he was credible before this Court.

Having resolved the issue of credibility and finding that—Detective Hancock, on the other hand, I did find to be credible even up to an including the fact that did he not occasion surveillance at the 5150 Wildwood address, which supports his statement that he d:d not know that Mr. Simoneau lived at that premises on an ongoing basis, just depending on Officer Hancock's testimony to be credible, and therefore I resolved the following factual conflicts regarding his testimony and document Detective Hancock's testimony: That there were cylindrical objects that he observed Mr. Simoneau carrying on the morning of June 3rd, 1998; that he observed Mr. Simoneau pick up a glass and wipe it off before walking over to—excuse me—to deposit something that he thought was a glass into the bed of the truck; and then when he came back, that Mr. Simoneau did pick up a glass and wipe it off before entering the pickup truck and driving to 5150 Wildwood.

And I further find that Officer Hancock was credible in his testimony that he could see the tailgate of the pickup and the reflectors from his location on the public thoroughfare, and 51 joins—that adjoins or is adjacent to Wildwood observed through the passenger-side window heavy-duty brass-key-type padlocks; that they were recently damaged. I find all those factual assertions to be credible, given the testimony of Detective Hancock.

Moreover, I declare that the testimony of Detective Hancock that he did see the truck's tailgate and reflectors from the public thoroughfare—I also note

Detective Hancock's testimony that he could see the tailgate and reflectors as not inconsistent with Mr. Wright's testimony.

First, Mr. Wright indicates that he only notes that Mr. Simoneau has spent the time when he comes out of his home on the morning thereafter to obtain his newspaper. Moreover, Mr. Knights does not provide specific testimony as to the location of the vehicle in the night in question, which is of crucial significance to this Court.

Second, at best, Mr. Wright's declaration indicates that one can't see into the curve when driving by, but offers no evidence on the more salient question of whether one can see into the curve from a standing position, which is where Detective Hancock indicates he made these observations from. Consistent with this finding, the record reflects that Simoneau's truck was parked closer to the street than to Mr. Wright's residence; that the truck was parked in the turn area of the roadway that's just before an easement along access to a separate home, access to which—that is that separate home is obtained via this common driveway where Simoneau's vehicle was parked.

Now having resolved those factual issues and now looking at the factors that are set forth in *U.S. v. DePuis* and several other cases that give the Court the standard pursuant to which it's determined whether or not this vehicle on this occasion was parked within the curtilage of Mr. Wright's home, I note the following.

With respect to the first factor, the areas proximity to the home, I find that the location of the truck in terms of proximity to the home certainly weighs against a finding that the vehicle was within the

curtilage. This vehicle was parked far enough down the road so as not disturb the residents of the home. And it was parked—now having made factual findings supporting and finding credible Detective Hancock's statements, it was parked at a place where the reflectors and the tail of the truck could be observed.

The second factor focuses on the nature of the uses and the intimate activities of—and whether intimate activities of the home are carried on in this area. Clearly Mr. Wright's testimony was that no such activities—family picnics, get-togethers or anything of that nature—were occurring or ever occurred in the area where Mr. Simoneau parked his vehicle. So that factor also cuts against a finding that this vehicle was parked within the curtilage.

The third factor—steps taken to protect from public view the area at issue—I note that while there are trees that do obscure views, there is no testimony that these trees were planted for the purposes of protecting the driveway from observation. And, in fact, on this factual record I have found, crediting Detective Hancock's testimony, that the vehicle was observable from the public thoroughfare. There are "No Trespass" signs posted. And, as I previously indicated, Mr. Wright's testimony in this issue was not inconsistent with the Court's finding; as he indicated, that there was a blind spot that was difficult to see from a vehicle. That is not in conflict with Detective Hancock's testimony.

Now, Simoneau's testimony that he gave Detective Hunter his driver's license prior in time to Hancock's entry onto the driveway, in this Court's view, adds nothing to the objective prong of this analysis. And to

the extent that there is an issue of the officer's subjective state of mind, having found his testimony credible that did he not know—and I do find it credible—that Simoneau lived there, is consistent with his canvassing the neighborhood to find out Simoneau's connection to the private roadway there at 5150 Wild Horse Road.

So to the extent that there was some subjective determination being made, I find, having found Detective Hancock credible, that, in fact, he did not. Therefore the fourth factor—whether the area was included within the enclosure surrounding the home—is the only factors that argues a support of finding that the vehicle was parked within the curtilage. However, the clear weight of the evidence with respect to all of the factors does not support such a finding.

As such, the observations of the truck made from a place where the officer had a right to be, inasmuch as the truck was not parked within the legal curtilage of this home, the facts that then innervate the issuance of the search warrant allowing for a search and seizure of the vehicle the Court finds to pass constitutional muster and to be reasonable.

Having made these findings, *Florida v. White* poses no legal impediment of the officer's entry on the road where the truck was parked or the observations made. Moreover, the Court finds the warrant was valid and did authorize a search of the vehicle, and that the impoundment of the vehicle was lawful.

With respect to the scope of the testimonies taken, which is the next issue addressed in this matter, from the truck, Mr. Simoneau's truck, I do find that under

Marx and several other decisions cited by Mr. Thompson, that there really is no clear nexus to criminality from several of the items that were seized. And the officer was involved in general exploration not sanctioned by a very specific search warrant.

Having made this finding, I note as follows; that in Officer Stuart's report of 6/3/98 inventorying the property seized, and more particularly items number 751, the silver and turquoise bracelet and brown and black necklace, 759, the foreign currency, seven—I have "7510," but the description is a silver-colored braided necklace and bracelet, horse pin, gold-colored ring with six rows of white stones—none of these items bear any nexus of criminality, yet are not within the scope of the warrant that authorized seizure, and therefore are suppressed.

However, I find the officer's conduct in seizing these items just referred to was not so flagrant with respect to the limitations in the search warrant such that this was a general search supporting suppression of all evidence seized. The items ordered suppressed are those specifically delineated by the Court. And with the exception of those items referenced, the defendant's motion regarding the items seized at the time of the search warrant on June 3rd is denied.

With respect to the search of the Ford wagon, license number CA3LAN399, that occurred on or about June 5th, the Court notes as follows. First, the Court finds that the officer's action in effecting the search and impound of this wagon meets the standards of reasonableness under the Fourth Amendment for the following reasons. First, the vehicle was evidence of a crime itself, having been involved in an automobile accident

just prior to its seizure. And so the automobile itself being fruits of the crime subject to seizure—as applied, the impound search under 22655.5, Subsection B, also passes constitutional muster inasmuch as there was a basis for the seizure and impound of the vehicle.

As such, the subsequent search and seizure of the items in the vehicle are justified under an inventory search rationale, and also under the doctrine of discovery in this matter. Therefore the motion to suppress the items seized from the truck on June 5th is denied.

Having ruled on the issues before the Court with respect to the motion of Mr. Simoneau, I now turn to the motion filed on behalf of Mr. Knight, and I note as follows; that Mr. Knights moves to suppress any and all items recovered in the search of his apartment on June 3rd, 1998, and on June 16, 1998.

In response, the Government contends that the defendant has consented to the search of his residence through his entry of a guilty plea and waiver of his Fourth Amendment rights as a condition and acceptance of the probation grant. In support of the its position the Government relies on *Zap v. The United States*; *U.S. v.* [*Ooley*], general concept cases. And the California Supreme Court's decision in *People v. Bravo*, wherein the Court upheld the search of a defendant's residence as a result of his consent to search as a term of probation.

Interestingly, the defendant Knight also cites to [*Ooley*] and argues that the Government's consent rationale was rejected in this case by the Ninth Circuit. The Court in [*Ooley*] did state as follows in the beginning of its analysis of the probation search. In that case the Government argues that [Ooley] consented to the warrantless search of his residence by having accepted as a condition of his probation the State's requirement that he relinquish his Fourth Amendment protections, notwithstanding his reference to the issue of consent. The Ninth Circuit remanded the case for determination of whether the search was a true probation search or not. Although not directly addressing the consent issue, [*Ooley*], implicitly if not directly, stands for the proposition that acceptance of a search clause as a condition of probation does not fully abrogate a defendant's Fourth Amendment rights.

As such, I find that [*Ooley*] cannot support the Government's consent rationale where the Court remanded the case, notwithstanding the assertion of consent as a rationale to uphold the search. Moreover, my research as failed to disclose a single federal case that has addressed the issue of consent in this context now before the Court, and determined that the acceptance of a search clause as a condition of probation constitutes a complete waiver of the party's Fourth, Amendment rights.

For instance, in *Griffin v. Wisconsin* the Supreme Court addressed the objectives served by the exercise of search pursuant to a regulatory scheme for probations. The Court sanctioned a departure from probable-cause requirement in cases involving a probationer search because the State's operation of a probation system, like its operation of a school, government office or the like, presents special needs beyond normal law enforcement that may justify departures

from the usual warrant and probable-cause requirement.

Specifically the court stated restrictions on probation liberties are meant to assure that probation serves—that the probationer serves a period of genuine rehabilitation, and that the community is not harmed by probationers being at large. These goals require the exercise of supervision to assure that restrictions are observed.

As importantly, the Wisconsin court stated that the imposition of a full-blown warrant requirement would interfere to an appreciable degree with the probation system and probation's ability to respond quickly to evidence of misconduct. In upholding the search in Wisconsin, the Court found that a tip provided by a police detective that the defendant had or may have had an illegal weapon at his home constituted the requisite reasonable grounds necessary to conduct a search.

Based on the Supreme Court's decision in Griffin, where the Court held that full-blown probable cause was not required to establish the reasonableness of a probation search under the Fourth Amendment, it seems implicit that there is some minimum expectation of pri[v]acy that remains, even post acceptance of a search clause, as a condition of probation.

Consistent with the Supreme Court's decision in *Griffin v. Wisconsin*, the First Circuit, in *U.S. v. Gianetti*, decided—which is *909 Fed. 2d 571*—stated that the permissible bounds of a probation search are governed by the following requirements. First, there

must exist a reasonable suspicion and, second, a finding that the search was a true probation search.

While the California Supreme Court authorities relied on by the Government in Bravo, *43 Cal. 3d*, and Reyes, *19 Cal. 4th*, wholly embrace the Government's rationale regarding the consensual nature of a search condition pursuant to a bargain for plea agreement and are also persuasive, [*Ooley*] clearly holds that these cases are not controlling. Whereas here the validity for a search conducted by State law enforcement officers is a question of federal law, given the Court's ruling in [*Ooley*] and the dearth of authority to support a finding of waiver in a probation-search context, I decline to adopt a rule at this juncture that—and will analyze a search here under [*Ooley*], Griffin versus—which is contained in current Ninth Circuit authority addressing validity of probation searches standard determining set forth in *Griffin v. Wisconsin*, [*Ooley*], and several other Ninth Circuit decisions, and is well defined.

These cases hold that under limited circumstances, law enforcement officers may search a probationer's home without obtaining a warrant and without probable cause. The permissible bounds of a probation search are governed by a reasonable-suspicion standard.

The Government argues here that a reasonable suspicion is not required, but if it is, the record here supports such a finding based on the Ninth Circuit decision *U.S. v. Davis, 32 Fed. 2d 752*. In Davis the Ninth Circuit defined the reasonable-suspicion standard as follows; that the officer must have a reasonable suspicion is limited to whether the item that is to be

searched is owned controlled or possessed by the probationer.

While I disagree with the Government's position regarding the requirement of reasonable suspicion, I find on this record that reasonable suspicion has demonstrated a view of Davis and the cases cited there and supports each of my conclusions in this regard, which I will discuss now.

First, regarding the requirement of a reasonable suspicion, I note that the Ninth Circuit in Davis was faced with determining the scope of the reasonable-suspicion standard as it relates to the items to be searched, because the defendant there, unlike the case at bar, conceded that the officers had the requisite reasonable suspicion to enter his residence. The Davis Court ultimately determined that the police had reasonable suspicion to search the safe at issue, as it was owned controlled or possessed by the probationer. While Davis speaks to the issue of the scope of reasonable suspicion in the probation-search context, it does not delineate the contours of the reasonable-suspicion standard in its broader application.

The standard governing reasonable suspicion required in a probation-search context is more clearly set forth in *U.S. v. Gianetta*, which is cited in the Ninth Circuit decision, and in Gianetta makes clear the reasonable standard applies to probation searches, and defines that standard more specifically that the First Circuit held, despite the absence of a regulatory scheme such as that at play in Griffin, that Griffin still applies to probation searches arising out of plea negotiations.

The Gianetta Court held that while a regulatory framework such as that operable in Griffin provides guidance to probation officers and furnishes constraints similar guides is provided in negotiated-plea context because the sentencing judge can narrowly tailor the scope of the search condition to the circumstances of the case. Therefore probation searches sanctioned by the courts that are based on reasonable [suspicion] are supported by the same special needs justifications and have the same characteristics of reasonableness as a search upheld in Griffin.

The Gianetta Court then went on to define reasonable suspicion as follows. A reasonable suspicion is a reasonable belief based on specific and articulable facts rather than a mere inchoate or unparticularized suspicion or hunch. In Gianetta the fact that the probation officer had assembled evidence of repeated unauthorized travel outside the district was sufficient. Gianetta, as I indicated previously, supports this Court's finding that as a matter of federal law, [probationers] retain some level of pri[v]acy post acceptance of a search condition.

Second, regarding whether the Government has met its burden to establish suspicion, I find the Government has met its burden with respect to the making of incendiary devices and/or participation in the arson of the PG&E equipment at Devlin Road without error. With respect to the use and possession of narcotics, first, it is clear that on a continuum reasonable suspicion requires more than a hunch, but something less than probable cause. Probable cause, in turn, requires something less than a preponderance of the evidence.

On this record the Court finds the following facts give rise to a reasonable suspicion. First, the history of vandalism of the PG&E facilities and the occurrence of that vandalism close in time to appearances made in court by Mr. Knights. Second, that Knight and Simoneau were present at Route 29 Rivendell Road (phonetic) May 24th, 1998, at approximately 10:30 near the PG&E gas line—near a PG&E gas line; and that Knight, prior in time to this, had been arrested for the theft of PG&E services, establishing some motivation.

Moreover, at the time that observation on May 24 a sheriff's deputy noticed and observed chains and pipes of the types that were used in the vandalisms, and they were seen in the trunk of Mr. Simoneau's vehicle. Thereafter Detective Hancock was aware of Clark's report of the location of Mr. Simoneau's vehicle near the 539 Brown Street residence Mr. Knights lived; and that on June 2nd, approximately one hour or so after the Devlin Road arson, Deputy Clark touched the hood of Mr. Simoneau's vehicle and found it to be warm.

Moreover, there was surveillance set up outside of Knights' residence on the evening of June 2nd and into the morning of June 3rd. And at their—at that time, Mr. Simoneau was observed carrying three cylindrical items, which I made actual findings with respect to, out of the apartment area of Mr. Knights' apartment, and to deposit those items into the Napa River.

These facts, in the Court's view, provide more than a hunch that Mr. Knights was involved in and had a motivation to be possessed of items of an incendiary nature, the manufacture of which would be inconsistent with the rehabilitative aspects of his probation. And

the Court finds requisite reasonable suspicion on this ground and on this basis alone.

The legal issue left to be determined, then, is whether the validity of—regarding the validity of this search focuses on whether the search was a true probation search or an investigative search in nature. This legal requirement, as clearly set forth in the [*Ooley*] decision, focuses on whether or not the record demonstrates that the search was to advance the goals of probation, the overriding aim of which is to give the probationer a chance to further demonstrate his rehabilitation while serving part of his sentence in the community.

The analysis is further complicated here where the search clause specifically allows for searches by peace officers, probation officers, but fails to make any mention—excuse me—but fails—but the record fails to reflect the appointment of a probation officer that the officer could contact to obtain permission to exercise on the probation clause. Because there was no assigned probation officer for Officer Handock to contact, the record here is a bit more complicated than the cases cited by counsel to the Court. While these facts complicate the analysis, they do not present insurmountable roadblocks for the resolution of this matter.

The Government asserts that the search—that a search that is motivated in whole or part by a law enforcement officer's belief that a probationer is committing a new crime serves a probationary purpose. In addition, the Government argues that efforts via search geared to determine if Mr. Knights was making explosive devices addresses issues of potential harm to the community, therefore serves an additional pro-

bationary purpose. The Government asserts through the testimony of Officer Hancock that in effecting the search of Knights' residence, the officer acted to ensure that he wasn't involved in the possession of or manufacture of any weapons, and a search to deter such conduct fosters rehabilitation and serves the objective.

Facts known to Hancock prior to the execution of the probation search, prior to the search June 1998, are the following. First, Defendant Knight suspected in a PG&E vandalism dating back to 1996. Officer Hancock was involved in that investigation.

Second, on June 2nd Hancock learned from Deputy Clark that Simoneau's truck was parked at Knights' residence roughly one hour after the Devlin Road arson. When he palpated the hood, the hood felt warm.

Third, on June 2nd Hancock learned from Deputy Hunter that Simoneau and Knight had been together in Simoneau's vehicle on May 24th at Route 29 at approximately 10:30 at night, and that Hunter had observed chains and bars, the types of objects that were used in a vandalism of PG&E equipment, in the back of Mr. Simoneau's truck, consistent with this evidence. And on June 2nd prior to surveillance of Knights' home, Hancock prepared an operations order and obtained permission to search Knights' home at a time when the objective evidence pointed to Knight as a suspect in the arson that had occurred on Devlin Road.

This evidence in its totality establishes that Knight was present with Mr. Simoneau and that he was in Simoneau's truck, where objects were observed consistent with those used to vandalize PG&E property, but even after adding in the observations that were

made on the morning of June 3rd, 1998, outside of Knights' residence, the Court finds that the objective evidence, as opposed to the subjective evidence or characterization of the purpose of the probation search, does not support the Government's conclusion that this search was conducted for purposes consistent with goals served by probation; that is to say notwithstanding Officer Hancock's testimony that he was concerned about deterring the commission of crime based on possession or manufacture of incendiary devices and effecting the search of Knights' residence, the weight of the objective evidence supports a finding that a search here was undertaken for purposes of fostering the investigation of Mr. Knights' involvement in the possession and manufacture of incendiary devices primary to obtain evidence toward a criminal investigation for arson or manufacture of those same incendiary devices. And under current Ninth Circuit law, this search was invalid here.

Just as in *U.S. v. Merchant*, Officer Hancock's failure to seek permission of the Court is objectively troulbed [*sic*]. Officer Hancock took time to seek permission from his supervisor to conduct a probation search on June 2nd, a day before the search of Knights' residence. He failed, though, to use that same time to seek permission from the Court. Merchant, a 1984 Ninth Circuit decision, clearly indicates that in the absence of an assigned probation officer, it is a sentencing judge who retains he power to require supervision of the probationer to punish violations of conditions of probation and to reoke probation. And Merchant cites California authority *In Re: Osslo*, O-s-s-l-o, at *51 Cal. 2d, 371*. Here, as in Merchant, where the issue was discussed in the context of objective good faith, I find

the objective facts strongly suggest the search was subterfuge conducting a criminal investigation.

The prosecution next argues that the Supreme Court's decision in [*Whren*] alters significantly the Court's analysis of whether the search is a true probation search or not. This is because [*Whren*] enunciates the principle under the Fourth Amendment is objective reasonableness, and where there is objective evidence to support a finding of probable cause, the Court is not to be concerned with the officer's state of mind in analyzing Fourth Amendment issues.

I find that [*Whren*] imposes no safe harbor for the Government with respect to the justification of this search. First [*Ooley*] is post [*Whren*] by a full year, yet the Ninth Circuit remanded [*Ooley*] to the trial court for purposes of ascertaining whether the search undertaken in that case was a true probation search. The standard enunciated in [*Ooley*] is consistent with the requirement that probation searches, as special needs searches, can be effected on something less than probable cause. Moreover, [*Whren*] is fully consistent with the analysis here.

Finding that, based on my view of the objective evidence without regard to subjective concerns, the weight of the objective evidence supports a finding as a matter of fact that this search was undertaken for purposes of investigating Mr. Knights' involvement in the manufacture of incendiary devices. As such, if [*Whren*] applies at all, it requires that there be objective evidence that the probation search at issue was for probation purposes. The record in this case, I have found, fails to establish any such objective evidence, other than Office Hancock's after-the-fact declaration that

this search was to determine if the defendant was committing crimes involving incendiary devices, which is inconsistent with the goals of probation.

I note that to the extent that there is any objective evidence to support the search of Mr. Knights' residence for probation purposes, it would have to be as set forth in the June 2nd request by Detective Hancock of the supervisor to effect the search for drugs. However, on this record there is no reasonable suspicion to support such a search.

Now in so ruling, I find that any probation search could be characterized in like fashion to the characterization asserted here by the Government, and would render all probation searches appropriately characterized as rehabilitative in nature as valid.

Second, in spite of the Court, the Government's questioning of the proper contours that should govern the Court's determination of whether this is a probation search or not, I am not at liberty to depart from Ninth Circuit precedent on this question.

Third, I note that the analysis of the consent-waiver issue by the California Supreme Court in cases such as Bravo, while they are persuasive, the issue in terms of the validity of the search is a matter of federal law. I say this because the government has pushed the Court to consider—and I have considered it—the quandary local law enforcement officers find themselves in, given the standards enunciated in [*Ooley*] versus the bright line rule enunciated by the California Supreme Court in Bravo. While these cases approach the issue differently, the legal positions that they articulate and the conflict emanating from these holdings has been long-

standing and has not varied over time. As such, the officers have or should have been on notice regarding the law of probation searches with respect to Ninth Circuit as a matter of federal criminal procedure and with respect to the California Supreme Court's analysis in Bravo.

Lastly, the Government offers two other alternative rationales for upholding the search of Mr. Knights' residence: The doctrine of inevitable discovery and good faith under Leon regarding inevitable discovery. The court finds that on these facts the Court has a significant question as to whether a warrant would have issued from Knights' residence. The affidavit at issue fails to set forth training and experience regarding Hancock's ability to identify the objects carried by a Simoneau on the morning of June 3rd as pipe bombs. While the record articulated based on the totality of the evidence provides, in this Court's view, a basis for a reasonable suspicion, I have already noted that that standard is less than a fair probability that is required for the issuance of a search warrant.

I find the affidavit here deficient regarding the officer's training and experience with respect to the standard necessary for the issuance of a search warrant with respect to Mr. Knights' residence. The affidavit, while articulating the vandalisms occurred within several days of Knights' arrests far conduct related to PG&E property, failed similarly to articulate any facts or officer's expertise connecting Knights' home as a place where the items of contraband might reasonably be found. Based on the absence of these facts, I find there are significant questions on this record as to whether a warrant would have issued.

Moreover, the exercise of discretion incumbent in the issuance of a search warrant by a neutral magistrate cuts against the policy that underpins the doctrine of inevitable discovery. The Court finds inevitable discovery does not support the reasonableness of the search in this matter.

Finally, the Court finds that the existence of long-standing clearly delineated case law in the Ninth Circuit regarding the standard governing probation searches, the application of the good faith rationale for upholding such a search, cut against a finding that any reasonable officer could have reasonably relied to his—in good faith on California authority solely in the exercise and effecting the search in this matter. Finding no rationale supported objectively in the record to sustain the Government's burden of proof with respect to this search of Mr. Knights' residence on June 3rd, I hereby suppress all evidence seized during that search.

Finally, with respect to the June 16th, 1998, search, having reviewed the entirety of the record, the Court finds there is clearly a basis to find common authority based on the mutual use of the property by a person, in this case defendant Knights' girlfriend, Kathy Brown. And the record supports a finding of joint access or control. Moreover, she was present on the 3rd at the time of the search, and again on the 16th.

There is one bedroom in the residence, and both Miss Brown and Mr. Knights have access to that residence and that bedroom. She was observed packing objects when the officers arrived. All these facts establish, at a minimum, access, if not control. The testimony further was that the door to the apartment was ajar and Miss

Brown allowed the officers entry, further supporting an objective finding of access and control. Under the Kelly decision of the facts as delineated by the Court, I find the officers had consent to search, and as such, I deny the request to suppress the evidence as a result of the search of Mr. Knights' residence on June 16, 1998.

Those are the rulings that the Court enters with respect to both motions to suppress in this matter.

* * * * *

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 99-10538
D.C. No. CR-99-00108-MJJ

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

MARK JAMES KNIGHTS; STEVEN SIMONEAU,
DEFENDANTS-APPELLEES

[Filed: Oct. 5, 2000]

ORDER DENYING PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

Before: CANBY, REINHARDT, and FERNANDEZ, Circuit Judges.

The panel has unanimously voted to deny the appellant's petition for rehearing. The petition for rehearing en banc was circulated to the judges of the court, and no judge requested a vote for a en banc consideration.

The petition for rehearing and the petition for rehearing en banc are DENIED.

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Supreme Court, U.S.
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APR 4 2001
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CASE # 00-1260

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

CORRECTED COPY

MARK JAMES KNIGHTS,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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ISSUE PRESENTED FOR REVIEW

1. May police conducting a criminal investigation rely upon the imposition of a probation search condition to conduct a warrantless search of a probationer's residence?

STATEMENT OF THE CASE

A. Procedural Background

On June 3, 1998, Respondent was arrested and taken into custody by state law enforcement officers following the search of his home. Pet. 3. On June 19, 1998, the Napa Municipal Court conducted a preliminary examination, and on July 2, 1998, a felony Information was filed in Napa Superior Court charging Respondent with possession of a destructive device, possession of ingredients to make a destructive device, possession of ammunition, possession of stolen property, and possession of smoking device. C.A. S.E.R. 4-8.[1] Respondent was released on bail, and a jury trial was scheduled for Aug 31, 1998. *Id.* at 9, 15. The trial date was subsequently continued until February 16, 1999. *Id.* at 11-13, 19.

Nine months into these state court proceedings, a federal complaint was filed against Respondent in the Northern District of California charging the identical conduct as a violation of federal law. Respondent was arrested and taken into federal custody. On April 6, 1999, an indictment was filed charging the Respondent and a co-defendant with one count of conspiracy to commit arson and charging the Respondent with one count of unlawful possession of ammunition.

In federal court, the Respondent filed a motion to suppress evidence seized during a warrantless search of his residence. The district court held an evidentiary hearing and in an oral order granted the motion to suppress with respect to one of the two searches challenged by the Respondent. Pet. App. 5a. The government timely appealed.

[1] Throughout this memorandum, "C.A. E.R." refers to Respondent's Excerpts of Record filed with the court of appeals; "C.A. S.E.R." refers to Respondent's Supplemental Excerpts of Record; and "C.R." refers to the trial court docket sheet.

B. Statement of Facts

On June 1, 1998, a Pacific Gas & Electric (PG&E) power transformer and adjacent Pacific Bell telecommunications vault in Napa, California, were pried open and set on fire. Although there were no witnesses to the vandalism, Respondent and an associate were suspected, based on an ongoing investigation Napa law enforcement officers had been conducting for approximately two years into a series of arsons in the area. Pet. App. 2a-3a. At 8:00 a.m. on June 3, 1998, nine local law enforcement officers broke down the door of the Respondent's apartment building and conducted a warrantless search of his apartment. Pet. App. 4a.

On the day before the search, Napa County Sheriff Department Detective Todd Hancock prepared an "operation order" describing the basis for his belief that Respondent had participated in the recent arson and seeking permission to have other officers help with the search. Pet. App. 3a-4a, 32a-33a; C.A. S.E.R. 1-3. Law enforcement officers surveilled the Respondent's apartment for approximately eight hours before the search. Pet. App. 3a-4a. In the hours immediately preceding the search, Detective Hancock gathered staff for the search, briefed them on the situation, and made preparations for the search.

During this time, Detective Hancock did not obtain a warrant to search the Respondent's apartment. Pet. App. 4a. Instead, Detective Hancock reviewed records in the Sheriff's Department and determined that the Respondent was on probation and was subject to a search condition. *Id.*; C.A. E.R. 126. Detective Hancock relied on the existence of this search clause to search the Respondent's apartment instead of seeking a search warrant. Detective Hancock did not make any effort to contact the probation office or the sentencing judge before the search. No probation officer accompanied the officers who searched the Respondent's apartment, nor was any probation officer informed of the impending search.[2] Pet. App. 10a.

Respondent had been placed on summary probation on May 29, 1998, as a result of his

[2] The Respondent was on summary probation and did not have a probation officer assigned to him. Pet. App. 4a.

conviction for a misdemeanor drug offense. Pet. 2. There is no evidence that this conviction was pursuant to a negotiated disposition. The only evidence regarding the search condition is contained in the Napa County Probation Order, dated May 29, 1998, which Respondent signed after he had already sustained a conviction. The form states that the Defendant, "having been convicted" of a misdemeanor violation, is "hereby ordered to a term of probation." C.A. E.R. 73. Possible terms and conditions are listed, with a box to check beside each one. There is a check in the box next to the search condition, which requires the Defendant to "[s]ubmit his/her . . . place of residence . . . to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer." *Id.* The Defendant's signature appears as acknowledgment that he has received a copy of these conditions and "agree[s] to abide by same." *Id.*

The officers searched the Respondent's apartment for approximately 1 ½ hours. C.A. E.R. 128. Following the search, the Respondent was arrested. Later on the day of the search of the Respondent's apartment, Detective Hancock swore out an affidavit for a search warrant to search the co-defendant's truck. Pet. App. 22a-23a. The warrant was issued, and the truck was searched the same day. Pet. App. 4a.

Nine months later, federal authorities intervened and the case was re-filed in federal court. Respondent moved to suppress all evidence seized during the warrantless search of his apartment on grounds that the search conducted by state officers was not valid under federal law. Pet. App. 5a. Respondent argued that the search was not a valid probation search but rather had been styled as such by law enforcement as a means of evading the Fourth Amendment's warrant requirement.[3] The government argued several different theories in response, among them the contention that the Respondent had consented to the search through the waiver of Fourth Amendment rights as a condition of probation. Pet. App. 5a.

After an evidentiary hearing, the district court granted the Respondent's motion to suppress

[3] Respondent also contended that the officers did not have the reasonable suspicion necessary to conduct a probation search. This argument was rejected and is not at issue here. Pet. App. 10a.

all evidence seized in the June 3, 1998, search. Pet. App. 37a. The court ruled that acceptance of a probation search condition does not eliminate all of a probationer's Fourth Amendment rights. *Id.* at 24a-25a. Relying on "longstanding clearly delineated case law in the Ninth Circuit regarding the standard governing probation searches," the district court concluded that the warrantless search of the Respondent's apartment violated the Fourth Amendment because it was an investigatory search, not a valid probation search. *Id.* at 31a 35a, 37a. To determine whether or not the search was undertaken to advance the goals of probation, rather than to further an independent criminal investigation, the court examined the record of events leading up to the search. After carefully reviewing the record, the district court found that "the weight of the objective evidence supports a finding that a search here was undertaken for purposes of fostering the investigation of Mr. Knights' involvement in the possession and manufacture of incendiary devices primary [sic] to obtain evidence toward a criminal investigation for arson or manufacture of those same incendiary devices." *Id.* at 33a.

The court of appeals affirmed. The court acknowledged that an individual may consent to a search and, noting that Respondent here did so consent, the court relied upon numerous precedents which established that the consent "must be seen as limited to probation searches, and must stop short of investigation searches." Pet. App. 6a-8a; *see also id.* at 9a (noting long line of cases). Turning to the facts of this case, the court echoed the district court's conclusion that the search was indisputably an investigatory search, conducted by law enforcement as part of an ongoing criminal investigation. The court considered, and rejected, the government's contention that the decision in *Whren v. United States*, 517 U.S. 806 (1996), undermined Ninth Circuit precedents. The court noted that in *Whren* this Court held that an officer's subjective intentions will not invalidate a search supported by probable cause; the ruling did not address a search for which there was no probable cause but only the probationer's consent to a search condition. Pet. App. 11a. In response to the government's expressed concern about the discrepancy between state and federal law, the court declined to modify federal law to accommodate California, noting that "[f]or at least three decades, it

has been the law of this circuit that subterfuge probation searches are unconstitutional." *Id.* at 12a-13a.

REASONS FOR DENYING THE PETITION

1. Petitioner's Central Argument Was Not Raised in the Court of Appeals and is Not Supported by the Factual Record.

Petitioner contends that the warrantless search was lawful because it was based on Respondent's consent. Petitioner's central argument is that a probationer may lawfully choose to accept a search condition which subjects him or her to warrantless, suspicionless searches, in exchange for the avoidance of a prison term. Thus in section 2.a., Petitioner reviews cases demonstrating that a criminal defendant may waive constitutional protections pursuant to a plea agreement. *See* Pet. 12 ("an individual may . . enter into arrangements with the government under which the individual relinquishes constitutional rights in return for a promise of favorable treatment"); *id.* at 13 ("the government may attempt through negotiation to persuade a defendant to plead guilty to a criminal charge"); *id.* ("the government may encourage a guilty plea by offering substantial benefits in return for the plea"); *id.* at 14 (if Respondent could have entered plea agreement providing for prison sentence, "there is no reason that he could not also bargain for a less onerous punishment"). At section 2.b., Petitioner addresses this Court's "unconstitutional conditions" jurisprudence. *Id.* at 15 (search condition not unlawful because it is "reasonably related to the benefit offered by the government as a quid pro quo"). At section 2.c., Petitioner states that "it has been suggested" that a probationer's consent to a search term is not truly voluntary and Petitioner seeks to prove the opposite. *Id.* Petitioner here relies again on precedents upholding the voluntariness of a plea entered into to avoid a greater punishment. *See id.* (consent not rendered involuntary by fact that "the alternative is incarceration"); *id.* at 16 (consent not unlawfully coerced because government "present[s] . . . choice in which one of the alternatives is plainly more advantageous than the other").

This Court should decline the petition for two reasons. First, Petitioner failed to present any of

these arguments to the court of appeals. That court thus had no opportunity to pass upon the merits of these claims. Second, the record is devoid of any factual basis to support petitioner's argument. There is no evidence that Respondent agreed to accept a search condition pursuant to a negotiated plea, or that he consented to this condition in exchange for any benefit. There is no evidence whatsoever of any negotiations between Respondent and the government. There is no evidence that the government ever presented Respondent with a choice, either before he pleaded guilty or before he was sentenced, between probation and incarceration. Nor is there any indication that the state court apprised Respondent that this condition would be a consequence of his guilty plea, nor that the court, prior to imposing sentence, informed Respondent that he could choose between accepting probation and the search condition, or going to prison. In short, there is no evidence that Respondent accepted this probation condition in exchange for any benefit at all.

Petitioner's theory, which relies upon an analysis of this probation search condition as if it were an element of a contract or "bargain" between Respondent and the government, is thus wholly unsupported by the facts of this case. Pet. 14.

2. The Court of Appeals' Decision is Consistent With the Precedent of Virtually Every Other Circuit in the Country.

Petitioner contends that the court of appeals' decision is in conflict with California law, as set forth in *People v. Woods*, 981 P.2d 1019 (Cal. 1999), *cert. denied*, 529 U.S. 1023 (2000), and urges this Court to overrule established Ninth Circuit law in favor of the position attributed to the California Supreme Court. Petitioner fails to acknowledge that the court of appeals' decision in this case is consistent with the precedent of every other federal court of appeals. Petitioner similarly ignores the fact that not a single federal court has adopted the California Supreme Court's questionable holding that a probationer who is subject to a search condition has, by that fact alone, agreed to submit to any search of his person or residence, by any law enforcement officer, for any law enforcement purpose.

Federal courts do not rely on a probationer's consent as the legal authority which authorizes warrantless searches of a probationer because this Court long ago abandoned the outdated view of

probation, or parole, as a privilege which a probationer obtains in exchange for a waiver of fundamental constitutional protections. *See Morrissey v. Brewer*, 408 U.S. 471, 480 (1972) (rejecting "right/privilege" distinction; declining to apply consent or waiver theory to justify limitations on liberty of parolee); *Griffin v. Wisconsin*, 483 U.S. 868, 872 (1987) (holding that "special needs" of probation system provide basis for state's limited intrusions on probationer's Fourth Amendment rights). In *Griffin*, this Court held that operation of a state's probation system presents the type of "special needs, beyond the normal need for law enforcement, [which] make the warrant and probable-cause requirement impracticable." *Griffin*, 483 U.S. at 873 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985)). Probation searches thus have been included within the larger category of inspection and regulatory searches, all of which share the assumption that the problems to which they are addressed could not be adequately dealt with under the usual Fourth Amendment restraints and that consequently the practices must be judged by somewhat different standards. *See, e.g.,Chandler v. Miller*, 520 U.S. 305 (1997); *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); *Michigan v. Tyler*, 436 U.S. 499 (1978); *Camara v. Municipal Court*, 387 U.S. 523 (1967). In these "exceptional circumstances," the court has employed a careful balancing that weighs "the intrusion on the individual's interest in privacy against the 'special needs' that support[] the program." *Ferguson v. Charleston*, ___ U.S. ___, 2001 WL 273220 (March 21, 2001).

This Court's reasoning in *Griffin* is premised in large part upon the distinction between probation officers and police officers. *Griffin*, 483 U.S. at 876 ("Although a probation officer is not an impartial magistrate, neither is he the police officer who normally conducts searches against the ordinary citizen.").[4] As part of his or her special relationship with the probation, the probation officer

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[4] In the related context of parole supervision, this Court recently reiterated the special role played by a parole agent:

> Parole agents, in contrast to police officers, are not "engaged in the often competitive enterprise of ferreting out crime," *United States v. Leon*, 468 U.S., 897, 914 (1984); instead, their primary concern is whether their parolees should remain free on parole. Thus, their relationship with parolees is more supervisory than adversarial.

is "supposed to have in mind the welfare of the probationer." *Id.* Thus, although the probation officer has a supervisory relationship with the probationer, the relationship is not entirely adversarial. *Id.* at 879. Because the probation officer occupies a space between police officer and impartial magistrate, and because the probation officer works for the welfare of the probationer and not in an entirely adversarial relationship, the Court concluded that probation searches present the exceptional circumstances which permit waiver of the Fourth Amendment's requirements of a warrant issued upon probable cause.

In the wake of *Morrissey* and *Griffin*, virtually every circuit has held that, regardless of the language of the search condition or waiver, a warrantless probation search is lawful only to the degree that it is actually a true probation search, conducted for probation purposes. Regardless of the variations in the particular tests applied, the federal courts that have considered this issue are unanimous in their view that police conducting a criminal investigation may not use a probation search condition as subterfuge for avoiding the Fourth Amendment's warrant requirement. *See, e.g. United States v. Giannetta*, 909 F.2d 571, 581 (1st Cir. 1990) (search must be for probationary purpose; probation officer may not be used by police to circumvent the Fourth Amendment's warrant requirement); *United States v. Hill*, 967 F.2d 902 (3d Cir. 1992) (parole officer's search authority stems from the parole system's "special needs"; search upheld where no evidence that parole agents acted on behalf of the police); *United States v. Martin*, 25 F.3d 293, 296 (6th Cir. 1994) (probation search may not serve as subterfuge for criminal investigation; search upheld where no evidence that probation officer was used to help police evade the warrant requirement); *United States v. Coleman*,

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Pennsylvania Bd. of Probation & Parole v. Scott, 524 U.S. 357, 368 (1998) (citing *Griffin v. Wisconsin*, 483 U.S. 868, 879 (1987)). The Court also recognized that a police officer cannot be expected to have the goals of the probation officer foremost in mind:

> Where the person conducting the search is a police officer, the officer's focus *is not upon ensuring compliance with parole conditions* or obtaining evidence for introduction at administrative proceedings, but upon obtaining convictions of those who commit crimes.

Id. (emphasis added).

22 F.3d 126, 129 (7th Cir. 1994) (police may not use probation search condition to evade warrant requirement); *United States v. Vincent*, 167 F.3d 428, 431 (8th Cir.) (search condition which fails to incorporate requirement of reasonable suspicion overbroad; finding search valid because probation officer's conduct complied with Fourth Amendment's reasonableness requirement) *cert. denied*, 528 U.S. 848 (1999); *United States v. McFarland*, 116 F.3d 316, 318 (8th Cir. 1997) (parole officer may not serve as "stalking horse" for the police); *United States v. Cantley*, 130 F.3d 1371, 1376 (10th Cir. 1997) (parole search must be done for parole purpose and not to evade the Fourth Amendment's warrant requirement); *United States v. Lewis*, 71 F.3d 358, 362 (10th Cir. 1995) (under *Griffin*, special needs of parole system allow for exception to Fourth Amendment's warrant requirement).

In the years since *Griffin*, most circuits have applied some variation of the "reasonable suspicion" standard to warrantless searches conducted under a probation search condition. *See, e.g.*, *Vincent*, 167 F.3d at 431. No circuit has ruled that a probation officer's ability to conduct warrantless probation searches is contingent upon a probationer's consent; nor has any circuit applied a waiver or consent theory to determine the permissible scope of a probation search.

3. The Perceived Conflict Between Federal Law and California Law May Shortly be Resolved; Recent Decisions From the California Supreme Court Indicate that the Court May Soon Follow The Path of the Federal Courts and Abandon the "Consent" Rationale Altogether.

The Petitioner suggests to this Court that, under California law, a probationer who is subject to a search condition, has, by that fact alone, agreed without qualification to submit to any search of his person or residence. Petitioner urges the Court to adopt this unequivocal interpretation of the consent-to-search clause in order to resolve the current conflict between state and federal law in California. Pet. 9. The Court should reject Petitioner's invitation.

As a preliminary matter, Petitioner is incorrect in the characterization of California law as endorsing an unequivocal blanket waiver. Even the California Supreme Court has not interpreted a probationer's consent to a search condition as an advance waiver of *all* Fourth Amendment rights, nor as a consent to any and all searches. Rather, that court has recognized that, regardless of the language of the waiver, a probationer may nonetheless challenge a search which is carried out in an

unreasonable manner or conducted in order to harass the probationer. *People v. Bravo*, 738 P.2d 336, 340 (Cal. 1987). A search is similarly subject to challenge in California if the probationer demonstrates that the search was not undertaken for a rehabilitative goal or a legitimate law enforcement purpose. *Id.*; *cf. People v. Reyes*, 968 P.2d 445, 451 (Cal. 1998) (parole search subject to challenge as "arbitrary and capricious when the motivation for the search is unrelated to rehabilitative, reformative or legitimate law enforcement purposes or when the search is motivated by animosity toward the parolee" on the part of law enforcement), *cert. denied*, 526 U.S. 1092 (1999). Thus even under California law, a probationer's consent to search is afforded a more nuanced interpretation than the Petitioner suggests. The focus of the California inquiry, moreover, turns in large part on the difficult question of whether the searching officers, in executing a probation search, acted with an improper motive.

The central reason for this Court to stay its hand, however, is the fact that the apparent conflict may shortly resolve itself without federal intervention. California's jurisprudence regarding the permissible bounds of a probation search has continued to evolve over the last few decades and two recent opinions suggest that the Court is currently questioning the continued vitality of the "consent" rationale for probation searches. *See Reyes*, 968 P.2d at 453-62 (Kennard, J., dissenting); *Woods*, 981 P.2d at 1029-38 (Brown, J., dissenting). Because the government's petition fails to address the unsettled state of California law, Respondent provides the following brief review of the essential developments.

California first adopted the consent rationale as a basis for waiver of a probationer's Fourth Amendment rights in *People v. Mason*, 488 P.2d 630 (Cal. 1971), *disapproved on other grounds*, *People v. Lent*, 541 P.2d 545 (Cal. 1975). The majority opinion in *Mason* ruled that the courts have broad discretion with respect to the imposition of conditions of probation; if the probationer considers the conditions too harsh, he or she may choose to go to jail instead. In 1981, in *United States v. Cordova*, 650 F.2d 189 (9th Cir. 1981) (per curiam), the dissent noted the apparent Fourth Amendment problems with California's unlimited search condition, arguing that the advance waiver

theory the court had relied upon in *Mason* had since been thrown into question both by the Supreme Court and by the Ninth Circuit. *Id.* at 191-92.[5] In 1986, the California Supreme Court announced that parolees -- as opposed to probationers -- could not be subject to search absent reasonable suspicion of criminal activity or a parole violation, a new rule which brought California law more in line with federal law. *People v. Burgener*, 714 P.2d 1251 (Cal. 1986). In 1987, however, in a case involving a probation search condition, the court relied on *Mason* for the holding that a probationer who consents to a search condition has waived Fourth Amendment rights and may be subject to search without a requirement of reasonable suspicion and for either probationary or law enforcement purposes. *Bravo*, 738 P.2d at 340. The court thus created a two-tiered system, under which parolees have greater Fourth Amendment protections than probationers.

The unusual scheme created by *Bravo* and *Burgener* persisted for eleven years. Then in 1998, in *People v. Reyes*, 968 P.2d at 452-53, a bare majority of the court overruled *Burgener* and held that a warrantless parole search need not be based on reasonable suspicion. The court could not rely on the consent exception to the warrant requirement to validate the search of an adult parolee because, under California's Determinate Sentencing Act of 1976, parole is not a matter of choice. *Id.* The court therefore resorted instead to a balancing test, relying on the "special needs" line of cases, and concluded that a search conducted pursuant to a proper probation condition does not impinge any privacy right that society is prepared to recognize. *Id.* at 451. The three dissenting justices strongly disagreed. *Id.* at 756-70 (Kennard, Werdegar, & Mosk, J.J., dissenting). Criticizing the Court's decision to eliminate the "reasonable suspicion" requirement, Justice Kennard emphasized the growing divergence between California's precedents and the views of "the vast majority of jurisdictions that have considered the issue." *Id.* at 453; *see also id.* at 455-57 (reviewing state and federal jurisdictions which have adopted reasonable suspicion requirement and/or ruled that a parole

[5] In 1985, the Ninth Circuit directly considered and rejected the consent theory espoused in California; foreshadowing *Griffin*, the court of appeals held that the incursion on a parolee's Fourth Amendment rights "is not based on consent" but arises from the "the unique status" and the dual responsibilities of the parole officer. *United States v. Jarrad*, 754 F.2d 1451, 1454 (9th Cir. 1985).

search could not be used by law enforcement as a subterfuge for evading the Fourth Amendment).

The following year, in *Woods*, a different 4-3 majority of the California Supreme Court reversed an appellate court's ruling suppressing evidence which had been seized in a warrantless probation search where police had conducted the search in order to investigate suspected criminal activity by the probationer's boyfriend, with whom she shared her residence. The court upheld the pretextual search of the probationer's residence, reiterating the view that the acceptance of a probation condition sufficed as advance consent to conduct the search, and ruling that the officers' subjective motivation would not invalidate an otherwise lawful probation search.

In dissent, Justice Brown challenged the court's continued reliance on the "consent" rationale, noting that "the consent theory articulated in *People v. Bravo* may be largely moot in light of *People v. Reyes*," which had, perforce, applied an administrative necessity rationale to parolees rather than a consent analysis. *Woods*, 981 P.2d at 1031 (Brown, J., dissenting). Justice Brown also criticized the majority's reliance on a consent rationale because the result was to "reintroduce[] a disparity between parolees and juvenile probationers on the one hand and adult probationers on the other" similar to the one the court sought to eliminate in *Reyes*. In addition, Justice Brown reiterated Justice Kennard's concern in *Reyes* that the court was straying far afield from the numerous state and federal courts who had struck down efforts by police to take advantage of the search condition to conduct criminal investigations unrelated to probation (or, in this case, the probationer). *Id.*

Four of the seven justices on the California Supreme Court have thus recently attacked the coherence of the court's approach to probation search conditions and have challenged the construction of a probationer's consent to a search condition as a blanket waiver of Fourth Amendment rights. *See Reyes*, 968 P.2d at 453-62 (Kennard, Mosk, & Werdegar, J.J., concurring and dissenting); *Woods*, 981 P.2d at 1029-38 (Brown, Kennard, & Mosk, J.J., dissenting). Three justices have specifically questioned the continued vitality of the "consent" rationale as the basis for warrantless searches of a probationer.

The present division between the Ninth Circuit and the state of California regarding the scope

of the probationer's search condition is not untenable. The evolving state of the law in California demonstrates that the distance between the two positions may be short-lived, as California appears poised to modify its own jurisprudence to align more closely to the law of this circuit. The petition for certiorari should be denied and the present conflict allowed to resolve itself.

4. Ninth Circuit Fourth Amendment Jurisprudence is no More Difficult to Enforce Than the Similar Precedents in Force Across the Rest of the Country.

The law in the Ninth Circuit has adhered to the same standard for warrantless probation searches for the last thirty years. Pet. App. 12a-13a ("For at least three decades, it has been the law of this circuit that subterfuge probation searches are unconstitutional."); *see also Smith v. Rhay*, 419 F.2d 160 (9th Cir. 1970) (not a true probation search where search condition used by police to circumvent Fourth Amendment warrant requirement). Federal law in this area is thus substantially more stable and well-defined than California precedents. *See supra* at 10-12 . It should not be so difficult for law enforcement officers to apply this law to determine for themselves whether or not they are embarking upon an investigative search for which the Fourth Amendment requires the issuance of a warrant.

The distinction drawn by the Ninth Circuit is neither complicated nor subtle. The rule is simple: the consent-to-search term of a probation agreement is limited to probationary searches, and not investigatory searches. The Court has identified several objective factors to be taken into account in evaluating whether a search is a true probation search and not an investigative search. For example, the court has identified the probation officer's involvement as one objective factor, although not an essential one, in determining whether a search is a valid probation search.[6] Additional factors

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[6] *See, e.g., United States v. Vought*, 69 F.3d 1498, 1500-01 (9th Cir. 1995) (probation search valid because probation officers decided to conduct search; police did not know about or participate in search); *United States v. Watts*, 67 F.3d 790, 794 (9th Cir. 1995) (probation search valid because probation officer suspected defendant before being contacted by police, and police got involved at probation officer's request); *United States v. Harper*, 928 F.2d 894, 897 (9th Cir. 1991) (probation search valid because probation officer obtained arrest warrant for violation before police contacted her; police accompanied probation officer on search); *United States v. Butcher*, 926 F.2d 811, 815 (9th Cir. 1991) (probation arrest valid because probation officer initiated arrest; police responded to probation officer's request for arrest and were not previously involved in investigating defendant); *United States v. Richardson*, 849 F.2d 439, 441 (9th Cir. 1988) (probation search valid because

this circuit routinely considers include (1) whether the probation officer had independent concerns about possible violations; and (2) who initiated the search, probation or police.[7] The type of search is not necessarily defined by the identity of the actor conducting it; rather, recognizing the overlapping roles of police and probation officers, the court has declined to establish a rigid rule that would validate or invalidate a search based on the title of the searching officer.

Significantly, the various states which make up the Ninth Circuit, apart from California, have all applied versions of the Ninth Circuit's standard for distinguishing between a valid probation search and an investigative search. *See, e.g., State v. Davis*, 891 P.2d 1373, 1378 (Or. Ct. App. 1995) (acceptance of probation search condition does not constitute self-executing, prospective consent to general warrantless search); *State v. Hindman*, 866 P.2d 481, 483 (Or. Ct. App. 1993) (rejecting argument that consent to probation search condition is prospective consent to all police searches; probationer does not waive all Fourth Amendment rights); *State v. Propios*, 879 P.2d 1057, 1062 (Haw. 1994) (not valid probation search where purpose is subterfuge designed to facilitate a criminal investigation); *Roman v. State*, 570 P.2d 1235, 1242 n.20 (Alaska 1977) (broad parole search condition does not authorize searches by police other than at the direction of parole authorities); *Seim v. State*, 590 P.2d 1152, 1155 (Nev. 1979) (affirming distinction between probation search and search conducted for "police investigatory objectives"); *State v. Mongomery*, 566 P.2d 1329 (Ariz. 1977) (probation search should be conducted by probation officer; while Arizona law does not prohibit warrantless probation search conducted by police officers, such expansion of search condition should

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probation officer approved search and obtained warrant to revoke probation before search); *United States v. Merchant*, 760 F.2d 963, 969 (9th Cir. 1985) (search invalid because district attorney did not contact probation officer).

[7] *See, e.g., Vought*, 69 F.3d at 1500 (parole officers conducted first search without police involvement and directed another parole officer to conduct second search); *Watts*, 67 F.3d at 792 (probation officer suspected criminal activity and asked police to conduct search if they were able to locate defendant's residence); *Harper*, 928 F.2d at 897 (parole officer had issued arrest warrant before search); *Butcher*, 926 F.2d at 814 (parole officer initiated search by telling police that defendant had violated parole and was a fugitive); *Richardson*, 849 F.2d at 440 (probation officer told police defendant was in violation when police requested a search, to which probation officers agreed); *Latta v. Fitzharris*, 521 F.2d 246, 247 (9th Cir. 1975) (parole officer initiated and led search because of suspected parole violations).

be rare); *State v. Webb*, 717 P.2d 462 (Ariz. Ct. App. 1985) (probation search must relate to probationary supervision); *State v. Hill*, 666 P.2d 92, 94 (Ariz. Ct. App. 1983) (police may not use probation officer as "stalking horse" for investigatory search); *State v. Matthews*, No. 22875-1-II, 1999 WL 65647 (Wash. Ct. App. Feb. 12, 1999) (parole officers may conduct supervisory searches without warrant but may not act on request of and in concert with law enforcement officials to evade warrant requirement); *State v. Owsley*, 918 P.2d 1231 (Idaho Ct. App. 1996) (even if executed by probation officer, not proper probation search if initiated by police for law enforcement ends); *State v. Burchett*, 921 P. 2d 854, 856-57 (Mont. 1996) (recognizing that probation search condition may not be used by police to evade Fourth Amendment requirement). Thus the practice of law enforcement officers in other jurisdictions is to determine in advance whether the search to be conducted is an investigative as opposed to a true probation search and to obtain a warrant if necessary.

California law enforcement officials who choose not to comply with federal law in this area retain the option of pursuing prosecution in state court. Respondent's case was initially prosecuted in state court, where all of the seized evidence was admissible. It was only on the eve of the state jury trial, when the United States Attorney filed the same case in federal court, that the admissibility of the seized evidence became an issue.

Petitioner contends that the "stalking horse" doctrine is "particularly difficult to apply." Pet. 8. The present case does not raise a "stalking horse" question. It is undisputed, as both reviewing courts have held, that the officer here made no effort to collaborate with the probation office or to contact the probation officer or the sentencing court prior to commencing the search.[8] On these facts, there is no basis for this Court to review the "stalking horse" line of cases cited in the government's petition. *See* Pet. 8 & n.5. Moreover, contrary to the suggestion in the government's petition, the "stalking horse" doctrine is hardly unique to this circuit. As noted above, the large majority of federal

[8] Because the defendant was on "summary probation," no probation officer had been assigned. As the district court noted, in the absence of an assigned probation officer, it is the sentencing judge who retains the power to require supervision of the probationer. Pet. App. 33a (citing *United States v. Merchant*, 760 F.2d 963 (9th Cir. 1984)).

courts, like the other states in the Ninth Circuit, agree that law enforcement officers should be deterred from using a probation officer as a "stalking horse" in situations where the Fourth Amendment requires issuance of a proper warrant.

5. The Decision of the Court of Appeals is Correct.

The decision of the court of appeals in this case falls squarely within established Ninth Circuit law which, as noted above, is not in conflict with any other Circuit, and is not in conflict with any precedents of this Court. The court acknowledged that the Respondent could, and did, consent to a search condition as part of his probation agreement, but also reiterated the established principle that consent to search obtained as a condition of probation is necessarily limited to probation searches, not investigatory searches. Reviewing the facts of the case, as set forth with clarity and particularity by the district court, the court concluded that the district court's determination that the search was an investigatory search, not a true probation search, "was not clearly erroneous. Indeed, it was an almost ineluctable conclusion." Pet. App. 10a.

Petitioner contends that the court of appeals' decision is in error for four reasons. Three of these reasons, however, address issues neither raised by the Respondent nor decided by the court of appeals. *See infra* at 5-6 (discussing Petitioner's arguments 2.a., 2.b., and 2.c). Petitioner thus suggests a misapplication of Constitutional principles where there has been none. As a final argument, Petitioner contends that this Court's ruling in *Whren v. United States*, 517 U.S. 806 (1996), favors rejection of current Ninth Circuit law in favor of California's consent rationale. This argument is unavailing. The instant case does not implicate the concerns of *Whren* because the court did not rely on the officers' subjective motivation to invalidate an otherwise lawful search. Moreover, *Whren* is fully consistent with this circuit's probation search precedents and with the law of all circuits that have invalidated investigatory searches in which police sought to use the probation condition as a subterfuge for evading the warrant requirement. In *Whren*, it was undisputed that the officer had probable cause to stop the vehicle for a traffic violation. 517 U.S. at 817. The defendant challenged the lawfulness of the stop nonetheless, arguing that the Court should apply to traffic stops a standard

higher than the ordinary "probable cause" standard in order to deter police from using traffic stops as a pretext for investigating other criminal activity. *See id.* at 810. In rejecting this argument, the Court refused to find that an otherwise lawful search "that is justifiable on the basis of probable cause" to believe that a crime has occurred would be rendered invalid by the officer's ulterior motives. *See id.* at 811-12. Significantly, the Court noted that those cases which disapproved the use of "pretexts" by law enforcement officers were particularly addressed to situations where the search was conducted without probable cause -- *i.e.*, in cases such as this case. *Id.* "[T]he exemption from the need for probable cause (and warrant), which is accorded to searches made for the purpose of inventory or administrative regulation, is not accorded to searches that are *not* made for those purposes." *Id.* (emphasis in original); *see also City of Indianapolis v. Edmond*, 121 S.Ct. 447, 456 (2000) (*Whren* holding "expressly distinguished" cases where court addressed the validity of searches conducted in the absence of probable cause). *Whren* thus "reinforces the principle that, while '[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis,' programmatic purposes may be relevant to the validity of Fourth Amendment intrusions" in the context of the administrative, investigatory or other "special needs" searches. *Edmond*, 121 S.Ct. at 456 (alteration in original) (quoting *Whren*, 517 U.S. at 813).

CONCLUSION

The decision of the court of appeals is not in conflict with the law of any other circuit, nor is it in conflict with this Court's precedents. The perceived conflict with the State of California may shortly resolve of its own accord. The petition for writ of certiorari should be denied.

Dated: April 16, 2001

Respectfully submitted,

BARRY J. PORTMAN
Federal Public Defender

HILARY A. FOX
Assistant Federal Public Defender

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

_____

_____

MARK JAMES KNIGHTS,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

I, ELIZABETH A. COOLEY, hereby certify:

That on April 16, 2001, an OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT in the above-entitled case was deposited in the United States Post Office mail box located in Oakland, California, addressed to the Clerk of the Supreme Court of the United States.

That additional copies of the petition and petitioner's motion were served on counsel for respondent:

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Dated: April 16, 2001

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Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 00-1260

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MARK JAMES KNIGHTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

No. 00-1260

UNITED STATES OF AMERICA, PETITIONER

v.

MARK JAMES KNIGHTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED ST/ TES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

1. The petition for certiorari explains that, under the well-established rule permitting searches based on consent, petitioner executed a valid and enforceable consent to future searches when he agreed as a condition of probation to "[s]ubmit his * * * person, property, place of residence, vehicle, [and] personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer." C.A. E.R. 73; Pet. App. 4a. We further explain that just as a criminal defendant may voluntarily plead guilty, thereby relinquishing the right to trial by jury and the various procedural rights that would be afforded him at that trial, nothing in the Constitution precludes a defendant from accepting probation subject to a condition per-

mitting warrantless searches by law enforcement officers.

Respondent contends (Br. in Opp. 5-6) that the government "failed to present any of these arguments to the court of appeals." That assertion is without basis. The government's brief in the court of appeals distinguished prior Ninth Circuit precedents on the ground that the court of appeals "ha[d] never squarely considered whether a probationer's consent to a search as a condition of probation is sufficient to authorize any probation search, even one that is undertaken for an investigative purpose." Gov't C.A. Br. 13. We explained that under this Court's precedents, "such a consent may constitute a valid waiver of a probationer's Fourth Amendment rights." *Ibid.* We observed that respondent "agreed to the warrantless search condition in return for obtaining the benefit of avoiding a longer custodial sentence," and that "as with waivers of other constitutional rights, [respondent's] consent is not rendered involuntary simply because he agreed to the search condition when the alternative was to refuse to accept the condition and face incarceration." *Id.* at 15-16. The government's court of appeals brief also drew on prior decisions of this Court and the California Supreme Court upholding guilty pleas entered pursuant to plea bargains. *Id.* at 16. The arguments set forth in the petition for certiorari were therefore fully aired in the court of appeals.[1]

2. Respondent contends (Br. in Opp. 6) that "the record is devoid of any factual basis to support" our position because the government did not present evidence that respondent's agreement to the search

[1] We have lodged a copy of our court of appeals brief with the Clerk of this Court.

condition was the result of a bargained-for exchange. But the validity of a property owner's consent to search does not depend on proof of a process of negotiation and exchange. It is sufficient that consent was given voluntarily, without government coercion. *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 229 (1973). By the same token, a voluntary plea of guilty entered by a properly advised defendant is valid and enforceable even if the defendant has not negotiated with the government regarding the ensuing disposition of the criminal charge. Indeed, "[o]nly recently has plea bargaining become a visible practice accepted as a legitimate component in the administration of criminal justice. For decades it was a *sub rosa* process shrouded in secrecy and deliberately concealed by participating defendants, defense lawyers, prosecutors, and even judges." *Blackledge* v. *Allison*, 431 U.S. 63, 76 (1977). Thus, until this Court's decision in *Santobello* v. *New York*, 404 U.S. 257 (1971), when "lingering doubts about the legitimacy of the practice were finally dispelled," *Blackledge*, 431 U.S. at 76, it was an open question whether evidence of negotiation between the parties could *impugn* an otherwise valid guilty plea. That history is inconsistent with any suggestion that a process of bargaining between an individual and the government is an essential predicate for a waiver of constitutional rights.

3. Respondent contends (Br. in Opp. 6, 8-9) that the Ninth Circuit's decision is consistent with the weight of authority in other courts of appeals. Respondent cites no case, however, in which a court of appeals has addressed the question whether a criminal defendant can execute an enforceable consent to future searches

as a condition of release on probation.[2] Moreover, in every one of the court of appeals cases cited at pages 8-9 of the brief in opposition, the court *sustained* the validity of the challenged probation or parole search.

In any event, as the petition for certiorari explains (at 20-21), the conflict between the Ninth Circuit and the California Supreme Court on the legality of "Fourth Waiver" searches of state probationers creates substantial impediments to effective law enforcement in the Nation's most populous State. That conflict by

[2] Respondent's reliance (Br. in Opp. 6-7) on *Morrissey* v. *Brewer*, 408 U.S. 471 (1972), and *Griffin* v. *Wisconsin*, 483 U.S. 868 (1987), is misplaced for essentially the same reasons. *Morrissey* holds that the Due Process Clause imposes some constraints on the procedures that may be employed in the parole revocation context, notwithstanding the fact that the State is under no constitutional obligation to permit release on parole in the first instance. 408 U.S. at 480-484. *Griffin* upheld a Wisconsin regulatory scheme that authorized warrantless searches of a probationer's home by a probation officer based on "reasonable grounds" to believe that a violation of the terms of release had occurred. 483 U.S. at 872-880. Neither decision addresses the question whether a probationer (or parolee) may execute a valid and enforceable consent to future searches as a condition of release into the community. Contrary to the suggestion of amicus Rutherford Institute (see, *e.g.*, Br. 2), the absence of express statutory authorization for warrantless searches of California probationers does not invalidate the search in this case. Requests for consent to search are routinely made on an ad hoc basis, and amicus identifies no case suggesting that the validity of a consent search depends on express statutory authorization to request the property owner's consent. *Griffin* is of no help to amicus; there, the Court sustained a warrantless search under *administrative* regulations promulgated pursuant to a statutory grant of authority. 483 U.S. at 870-871. The Court did not speak to the issue of consent.

itself warrants resolution by this Court.[3] See Br. of Amicus Curiae State of California 3-6.

4. Respondent contends that the present conflict between the Ninth Circuit and the California Supreme Court does not warrant this Court's resolution because the California Supreme Court may be in the process of revising its probation search jurisprudence. Respondent relies for that proposition on Justice Brown's dissenting opinion in *People* v. *Woods*, 21 Cal. 4th 668, 683 (1999), cert. denied, 529 U.S. 1023 (2000), and on Justice Kennard's concurring and dissenting opinion in *People* v. *Reyes*, 19 Cal. 4th 743, 756 (1998), cert. denied, 526 U.S. 1092 (1999). That contention lacks merit for at least three reasons.

a. The court in *Woods* observed that

> [i]n California, probationers may validly consent in advance to warrantless searches in exchange for the opportunity to avoid service of a state prison term. For nearly three decades, [the Supreme Court of California] has upheld the legality of searches

[3] Respondent suggests that the conflict in authority is of little moment because "California law enforcement officials who choose not to comply with federal law in this area retain the option of pursuing prosecution in state court." Br. in Opp. 15. But the Fourth Amendment to the United States Constitution applies equally to state and federal prosecutions; the fact that the state and federal courts in California would resolve the Fourth Amendment question presented here differently is a reason for this Court to grant review, not deny it. Respondent essentially ignores our observations that the Ninth Circuit's decisions in this and predecessor cases (1) impair the efforts of federal and state authorities to engage in cooperative law enforcement (Pet. 20), and (2) create a potential risk of civil damages liability in federal court for state officials who carry out searches that have long been upheld by the California Supreme Court (Pet. 20-21).

> authorized by probation terms that require probationers to submit to searches of their residences at any time of the day or night by any law enforcement officer with or without a warrant.

21 Cal. 4th at 674-675 (citations and footnote omitted). Respondent does not contend that a majority of the Supreme Court of California has ever disavowed either the ultimate conclusion that such warrantless searches are permissible, or the consent rationale on which that conclusion has been based. That individual members of that court have disagreed with some aspects of the majority's analysis does not lessen the practical significance of the current conflict between the Supreme Court of California and the Ninth Circuit.

b. As the petition for certiorari explains, the court of appeals' analysis in this case rests on a purported distinction between "probation" and "investigation" searches. The court held that where the purpose of a search is to confirm or dispel suspicion that a probationer is engaged in criminal activity, the search must be authorized by a judicial warrant, even if the probationer has previously consented to searches as a condition of probation. See Pet. App. 10a, 14a. Respondent identifies no opinion, however, in which *any* member of the California Supreme Court has endorsed that proposition.

In *Woods*, Justice Brown's dissenting opinion argued that officers could not rely on the Fourth Waiver to justify a warrantless search whose purpose was to investigate allegations of wrongdoing against the probationer's co-resident. Justice Brown would have held that the investigation of the co-resident was unconnected "to the reasons for imposing [a search] condition in the first place, i.e., to monitor the probationer's progress and compliance with the terms of probation." 21 Cal. 4th at 691 (citation omitted). Justice Kennard's concurring and dissenting opinion in *Reyes* took the view "that a warrantless search of a parolee is permissible only if there is a 'reasonable suspicion' that the parolee has committed a crime or has violated the terms of parole." 19 Cal. 4th at 756-757 (citation omitted). The search in this case appears valid under either of those approaches.[4] Neither of those opinions suggests that the applicability of a warrant requirement turns on whether a search aimed at the probationer is conducted for a "probation" or "investigation" purpose.

c. In *Reyes*, the California Supreme Court held that a state parolee may be subjected to warrantless searches without any showing of individualized suspicion, even though a California prisoner is not entitled to refuse parole and therefore cannot be said to have consented to the search condition. The court sustained the search on the theory that parolees have a reduced expectation of privacy in light of the conditional nature of their release, and that the interest in maintaining close supervision of parolees justifies the intrusions in

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[4] Because respondent consented to searches "with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer," C.A. E.R. 73; Pet. App. 4a, the validity of the search in this case does not depend on whether the searching officers had individualized suspicion of wrongdoing. The district court found, however, that "reasonable suspicion" existed, see Pet. App. 30a-31a, and the court of appeals did not question that holding. Rather, the court found that the search was invalid because the officers who conducted it were "using the probation term as a subterfuge to enable [them] to search [respondent's] home *without a warrant*." *Id.* at 10a (emphasis added).

question. 19 Cal. 4th at 747-754; see Pet. 10-11 n.8. In *Woods*, Justice Brown's dissenting opinion stated that "the consent theory articulated in *People* v. *Bravo* * * * may be largely moot in light of [*Reyes*]. * * * Th[e] administrative necessity rationale of *Reyes* applies equally to probationers and should effectively supersede the fictive consent justification of *Bravo*." 21 Cal. 4th at 686; see Br. in Opp. 12.

Justice Brown's statement provides no support for respondent's suggestion (Br. in Opp. 12-13) that the present conflict between the Ninth Circuit and the Supreme Court of California may resolve itself without this Court's intervention. To the contrary, Justice Brown simply recognized that under *Reyes*, warrantless searches of adult probationers may be permissible without regard to the validity of the probationer's consent. That such searches are now potentially sustainable under California Supreme Court precedent on two bases rather than one scarcely diminishes the conflict between that court's decisions and those of the Ninth Circuit.

5. The petition for certiorari explains (at 8 & n.5, 20) that the Ninth Circuit's probation search cases, taken together, have failed to articulate coherent and administrable standards for distinguishing valid from invalid searches. See *United States* v. *Conway*, 122 F.3d 841, 843 (9th Cir. 1997) (Wallace, J., concurring in the result) ("Our precedent on the Fourth Amendment standards governing state probation searches is in considerable disarray."), cert. denied, 522 U.S. 1065 (1998). The need for such standards is of critical importance to administration of the Fourth Amendment, "lest every discretionary judgment in the field be converted into an occasion for constitutional review." *Atwater* v. *City of Lago Vista*, No. 99-1408 (Apr. 24, 2001), slip op. 26; see

ibid. ("Often enough, the Fourth Amendment has to be applied on the spur (and in the heat) of the moment, and the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made.").

Respondent contends (Br. in Opp. 13) that "[t]he rule is simple: the consent-to-search term of a probation agreement is limited to probationary searches, and not investigatory searches." But because the most fundamental term of probation is that an individual must refrain from committing further crimes, any meaningful effort to monitor and supervise a probationer will necessarily involve efforts to determine whether the subject is involved in criminal activity. The purported distinction between probation and investigation searches is especially elusive as applied to persons on summary probation in California, who are not directly supervised by a probation officer. See Pet. App. 4a.

* * * * *

For the reasons stated above, and for those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

BARBARA D. UNDERWOOD
Acting Solicitor General

APRIL 2001

(2)

COPY

No. 00-1260

IN THE SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
FEB 27 2001
CLERK

UNITED STATES of America, *Petitioner,*

v.

MARK JAMES KNIGHTS, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE STATE OF CALIFORNIA IN SUPPORT OF GRANT OF CERTIORARI

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QUESTION PRESENTED

Whether a defendant's agreement to a condition of probation that authorizes any law enforcement officer to search his person and residence without a warrant, and without individualized suspicion, authorizes a search by a law enforcement officer investigating criminal activity.

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IN THE SUPREME COURT OF THE UNITED STATES

No. 00-1260

UNITED STATES of America, *Petitioner,*

v.

MARK JAMES KNIGHTS, *Respondent.*

INTEREST OF AMICUS CURIAE

The People of the State of California have a substantial interest in the apprehension of criminals and in the accuracy and reliability of decisions by their state's highest court. Yet, in *Knights*, the Ninth Circuit directly contradicted long-standing California Supreme Court case law, and presented California's 90,000 sworn peace officers with a Hobson's choice. Because of *Knights*, officers must now either (1) abandon the effective and oft-used tactic of relying on a probationer's search condition to conduct a warrantless search as part of an ongoing criminal investigation, or (2) face the prospect of civil rights litigation and liability for a violation of the Fourth Amendment.

SUMMARY OF ARGUMENT

The Ninth Circuit Court of Appeals has erroneously interpreted the Fourth Amendment by ruling that the warrantless search of a state probationer's residence or other property by state officers, based upon a state probation condition permitting such searches by "any law enforcement officer," is nevertheless unreasonable and therefore unconstitutional if it is undertaken for the purpose of "criminal investigation." This ruling not only directly contradicts the California Supreme Court, but also raises an important question of federal law that has not been, but should be, settled by this Court. U.S. Supreme Ct. R. 10(a), 10(c).

THE NINTH CIRCUIT ERRED IN FINDING A VIOLATION OF THE FOURTH AMENDMENT WHERE STATE OFFICERS SEARCHED RESPONDENT'S RESIDENCE, AS PART OF AN ONGOING CRIMINAL INVESTIGATION, IN RELIANCE UPON CONSENT HE HAD GIVEN AS A CONDITION OF PROBATION

For the past 14 years, the California Supreme Court has consistently ruled that when a state probationer consents, as a condition of his probation, to the search of his person, residence, vehicle and other property, by any law enforcement officer, with or without a search warrant or probable cause, a warrantless search of such areas may be undertaken constitutionally without regard to whether "reasonable suspicion" exists, and without regard to the searching officers' subjective motive or purpose. *People v. Bravo*, 43 Cal.3d 600, 605-611 (1987), cert. denied, 485 U.S. 904 (1988); *People v. Woods*, 21 Cal.4th 668, 677-681 (1999), cert. denied, 529 U.S. 1023 (2000).

In stark contrast, the Ninth Circuit Court of Appeals has consistently ruled, for an even longer period of time, that such a search is *un*constitutional unless (1) it is supported by at least "reasonable suspicion" *and* (2) it is undertaken to advance the goals of probation, the primary one of which is rehabilitation, rather than in furtherance of a "criminal investigation."[1] See, e.g., *United States v. Ooley*, 116 F.3d 370

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1. In the *Knights* case, since the searching officers had reasonable suspicion, if not probable cause, at the time they undertook the search, the only point of contention was their purpose.

(9th Cir. 1997), cert. denied 524 U.S. 963 (1998), and cases cited therein.

Thus, as happened in *Knights*, when state officers who are investigating a case undertake a warrantless search of their suspect's/probationer's residence or property in furtherance of their investigation, and without contacting or consulting with the suspect's probation officer or other probation department personnel, the Ninth Circuit will consider the search to be an unconstitutional "subterfuge" for a warrantless search, something which is clearly *outside* the scope of the probationer's consent.[2/] In the court's own words, the probationer's consent "must be seen as limited to *probation* searches, and must stop short of *investigation* searches."[3/] *Knights*, at p. 1142; emphasis added.

As for the glaring conflict between the Ninth Circuit's contrived and needlessly restrictive view and the California Supreme Court's broader and more reasonable view, the Ninth Circuit tersely noted in *Knights* that "that court does not control our reading of federal constitutional law." *Id.*, at p. 1144. It found the California Supreme Court's contrary analysis to be "unpersuasive" and observed: "Perhaps the California courts will admit the fruits of the search of Knights' residence; we will not." *Ibid.*

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2. Interestingly enough, however, even a search authorized or carried out by *probation* officers might not pass constitutional muster, as interpreted by the Ninth Circuit, if they were merely acting as a "stalking horse" for the police. See, e.g., *United States v. Watts*, 67 F.3d 790, 793-794 (9th Cir. 1995), reviewed on other grounds, 519 U.S. 148 (1997) (per curiam), and *United States v. Richardson*, 849 F.2d 439, 441 (9th Cir. 1988), cert. denied, 488 U.S. 866 (1988).

3. The distinction is only semantic, since a probationer's involvement in criminal activity obviously has a direct and substantial bearing on his effort to achieve rehabilitation.

Understandably, this blunt articulation of, and emphasis upon, the two courts' conflicting Fourth Amendment interpretations is causing considerable consternation and confusion among California law enforcement agencies. On the one hand, they very much want to continue doing what they have been doing for years, i.e., use the efficient and effective tool of conducting warrantless searches of probationers and their property, as sanctioned by the California Supreme Court.[4/] On the other hand, they wonder and worry whether undertaking such searches now and in the future for "criminal investigation" purposes will result in protracted and costly *civil rights litigation*, perhaps even in *personal liability*.[5/]

Just a few years ago, in apparent recognition of the importance of this issue, this Court asked the parties in *Pennsylvania Bd. of Probation & Parole v. Scott*, 524 U.S. 357 (1998) to brief the question of whether "a search of parolee's residence [must] be based on reasonable suspicion to be valid under the Fourth Amendment where the parolee has consented to searches as a condition of his parole." 522 U.S. 992 (1997). Although the subsequent opinion did not reach this issue, it remains of utmost practical importance to California's more than 90,000 sworn peace officers. As petitioner put it, "[l]aw enforcement officers should not be subject to pressures created by such conflicting legal regimes." (Ptn., p. 21.)

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4. In *People v. Reyes*, 19 Cal.4th 743, 752 (1998), cert. denied, 119 S.Ct. 1507 (1999), the California Supreme Court expressly recognized the value of unannounced, suspicionless searches in reaching the goal of rehabilitation..

5. The relatively recent opinion by the Ninth Circuit in *California Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039 (1999) cert. denied, 120 C.Sct. 2717 (2000), disallowing qualified immunity for intentional *Miranda* violations, still looms large in California law enforcement agencies' collective memory.

In sum, there is an immediate and overwhelming practical need for resolution of the deepening conflict between the Ninth Circuit's view and the view of the California Supreme Court. Accordingly, amicus urges this Court to grant the petition for writ of certiorari.

CONCLUSION

For the reasons stated, as well as those set forth in the petition for writ of certiorari, amicus curiae State of California requests that the petition for writ of certiorari be granted.

Dated: February 26, 2001

Respectfully submitted,

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MOTION FILED

APR 4 2001

No. 00-1260

In The
SUPREME COURT OF THE UNITED STATES

UNITED STATES,
Petitioner,

v.

MARK JAMES KNIGHTS,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICUS CURIAE* OF THE RUTHERFORD INSTITUTE IN SUPPORT OF RESPONDENT

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QUESTION FOR REVIEW SUGGESTED BY *AMICUS CURIAE*

Whether, in light of *Colonnade v. United States,* 397 U.S. 72 (1970) and *Griffin v. Wisconsin*, 483 U.S. 868 (1987), a condition of probation that a probationer submit to "a search any time of the day or night by any peace officer with or without a warrant," in the absence of legislative approval, is repugnant to the Fourth Amendment of the Constitution?

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Rutherford Institute hereby moves this Honorable Court for leave to file a brief *amicus curiæ* in support of the Respondent on the grounds that the brief is desirable in view of the significance of the issues raised by the Petitioner and by the State of California in support of a grant of certiorari, and to bring to the Court's attention important issues and legal facts not addressed by the parties and to clarify for the Court pursuant to Supreme Court Rule 15.2 California law and policy, all of which will be helpful to this court in resolving whether this case is appropriate for review at this time.

The Solicitor General of the United States has consented to the filing of this brief. Respondent's counsel has not consented.

The interest of the proposed *Amicus* in this case is fully set forth at page 1 of the Brief.

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

STATEMENT OF *AMICUS CURIAE* INTEREST AND INTRODUCTION[1]

The Rutherford Institute is an international, non-profit civil liberties organization headquartered in Charlottesville, Virginia. The Institute, founded in 1982 by its President, John W. Whitehead, educates and litigates on behalf of constitutional and civil liberties. Attorneys affiliated with the Institute have filed petitions for writ of certiorari in the United States Supreme Court in more than two dozen cases, and certiorari has been accepted in several significant constitutional cases. *See Frazee v. Dept. of Employment Sec.*, 489 U.S. 829 (1989); *Arkansas Educational Television Comm'n. v. Forbes*, 523 U.S. 666 (1998); and *Good News Club v. Milford Central School*, No. 99-2036 (October Term 2000). Institute attorneys have filed numerous *amicus curiae* briefs in the United States Supreme Court in cases involving the rights of the accused.[2] Institute attorneys currently handle several hundred cases nationally, including numerous Fourth Amendment cases. The

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1 *Amicus curiae* The Rutherford Institute files this brief upon leave of the Court. Counsel for The Rutherford Institute authored this brief in its entirety. No person or entity, other than the Institute, its supporters, or its counsel, made a monetary contribution to the preparation or submission of this brief.

2 *See, e.g., Wyoming v. Houghton*, 526 U.S. 295 (1999), *Slack v. McDaniel*, 529 U.S. 472 (2000), *Illinois v. Wardlow*, 528 U.S. 119 (2000); *Florida v. J.L.*, 529 U.S. 266 (2000); *Indianapolis v. Edmond*, 121 S.Ct. 447 (2000); *Ferguson v. City of Charleston*, Sup.Ct. No. 99-936 (March 21, 2001), and *Illinois v. McArthur*, 121 S.Ct. 946 (2001).

Institute has published educational materials and taught continuing legal education classes in this area as well.

The issue presented by this Petition, the degree to which a probationer can be searched "any time of the day or night by any peace officer," is a question of great concern, insofar as it touches upon how society deals with offenders and assures itself that the offender does in fact comply with conditions of probation while on a discretionary grant of probation. Because of the depth and breadth of its knowledge on this subject, the Rutherford Institute believes that its insights on this issue will be helpful to understand more accurately the legal environment in California with respect to that issue. Sup. Ct. Rule 15.2.

SUMMARY OF ARGUMENT

This court has consistently held that for a search to be valid, it must either comply with the Fourth Amendment or be legislatively, and expressly, authorized. Of the several states, District of Columbia and the territories of the United States, only three states, including California, permit search of a probationer any time of the day or night by any peace officer. Of a large number of state supreme courts that have considered the issue, all but three have rejected such a scheme as unconstitutional. The Ninth Circuit Court of Appeals' decision is therefore consistent with stare decisis from this Court and an overwhelming majority of state supreme courts. As California has not legislatively authorized search and seizure any time of the day or night by clear and unequivocal language, the court should decline review, or, in the alternative, grant certiorari, and summarily dispose of the case *per curiam* based on stare decisis.

ARGUMENT IN OPPOSITION TO CERTIORARI

I. THE NINTH CIRCUIT'S DECISION IS IN ACCORD WITH STARE DECISIS OF THIS COURT AND A MAJORITY OF THE STATE COURTS THAT HAVE CONSIDERED THE ISSUE

A. There Must Be A Clear, Express, Statutory Authorization For A Fourth Amendment Waiver To Be Effective

While statutory authorization of warrantless searches is not the *sine qua non* of a valid search, in the absence of an express statutory authorization, traditional Fourth Amendment rules must apply. *Colonnade Corp. v. United States*, 397 U.S. 72 (1970). In *Colonnade*, a case arising under 26 USC §§ 5301(c), 5146, and 7606 for possible violations of the Internal Revenue Code, the agents sought evidence of violations and demanded entry to inspect pursuant to a statutory authorization, which provided for sanctions on refusal to permit entry but did not expressly provide for a warrantless entry to search. The Court noted that "Congress has broad power to design such powers of inspection under the liquor laws as it deems necessary to meet the evils at hand." *Colonnade*, 397 U.S. at 76. It went on, however, to note "that administrative entry, without consent, upon the portions of the commercial premises not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure...." *Id.* at 76-77. The Court concluded, "Where Congress has authorized inspection but made no rules governing the procedure that inspectors must follow, the Fourth Amendment and its various restrictive rules apply." *Id.* at 77; *cf. United States v. Biswell*, 482 U.S. 691 (1972) (express Congressional authorization; regulated industry). In *Payton v. New York*, 445 U.S. 573 (1980), the Court struck down a state statute that

permitted warrantless searches absent probable cause. *See also G.M. Leasing Corp. v. United States*, 429 U.S. 338 (1977) (warrantless entry and seizure of assets on company property unlawful); *See v. Seattle*, 387 U.S. 541 (1967) (warrantless administrative inspection in commercial building unlawful); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920); *and cf. Illinois v. Krull*, 480 U.S. 340, 349-355 (1986) (statutory scheme for inspection of junk dealers held unconstitutional under state law) with *New York v. Burger* 482 U.S. 691, 699-703 (1987) (statutory inspection scheme of junk dealers upheld). Consequently, where no express legislative authorization exists that is reasonably related to the purposes of a probation program, traditional Fourth Amendment procedures must apply to avoid delegating unfettered discretion to peace officers.

All states make some provision for probation. Not all states are consistent with what conditions should be required, and some have not made any statutory provisions at all for conditions.[3]

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3 That there should be legislation, and uniformity in the legislation, is obvious in light of the states' various enactments of the Uniform Act for Out-Of-State Parolee Supervision. *See* United States Code and state statutory provisions cited in Appendix A. The Act does not provide for any particular conditions of probation, except as follows: "(2) That each receiving state will assume duties of visitation and of supervision over probationers or parolees of any sending state and in the exercise of those duties will be governed by the same standards that prevail for its own probationers and parolees." Cal. P.C., § 11177. This provides for discriminatory treatment. For example, a probationer from Illinois on supervision in California is subject to searches "any time of the day or night by any probation officer or peace officer" whereas a probationer from California on supervision in Illinois is subject to "visits by the

Insofar as Fourth Amendment search issues are concerned, the most common condition found is consistent with the Model Penal Code § 301.1(2)(j) "to report as directed to the Court or the probation officer and to permit the officer to visit his home; ...."See Appendix B, § 1. Many states adopting the (j) provision add "and elsewhere." See Appendix B, § 2. A few states provide, in one form or another for the MPC § 301.1(2)(l) "to satisfy any other conditions reasonably related to the rehabilitation of the defendant and not unduly restrictive of his liberty or incompatible with his freedom of conscience." Appendix B, § 3. Only two states, Illinois and North Carolina, have a detailed procedure for warrantless searches by a probation officer. Appendix B, § 4.

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probation officer at the probationer's home or place of work at reasonable times." Twenty-seven jurisdictions have express statutory provisions for either visits, searches, or both, limited to the probation officer; one permits the probation officer to use peace officers; none permit a peace officer to conduct searches. Twenty-seven jurisdictions have no express statutory provision for visits or searches by anyone; of these, one, New Mexico, by administrative regulation, prohibits a probation officer from conducting searches, requiring the officer to pursue normal search procedures, but by case law allows a probation officer to conduct searches. Courts in sixteen of the fifty-four jurisdictions surveyed have considered the issue. Two, Arkansas and Georgia, give greater latitude than expressly permitted by statute. In the Arkansas case, on state grounds, the scope of the statute limiting searches to probation offers was not discussed; the discussion centered only on federal grounds and the 4th Amendment, pursuant to *Griffin*. Eight found that the conditions imposed were rationally related to a legitimate purpose of rehabilitating the probationer. Only five were faced with a state statute which had no express provisions for visits or searches and of those five, only California permits "blanket searches." *See* following discussion and Appendices A and B.

Many states expressly provide for drug testing. Appendix B, § 5. No state, by statute, expressly permits a warrantless search by peace officers. *See generally* Appendix B.

A requirement that the several states by legislation authorize in the first instance the waiver of Fourth Amendment rights, with necessary safeguards, is essential in view of the importance of this issue, in order to give clear notice to those who must administer the program and those who must abide by the terms, provide clear guidance to probationers on their duties and responsibilities, provide for uniform treatment of probationers who are subject to relocation and transfer, and to assure that appropriate consideration is given to third parties and potential bystanders whose rights should not be impaired by unreasonable conditions of probation and parole.

B. This Court Held in *Griffin* that a State Does Have an Interest in Close Supervision of Those *In Custodia Legis*

Regardless of the applicable standard, a probationer's, or parolee's home, like everyone else's, is protected by the Fourth Amendment's requirement that searches be "reasonable." *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (probationer).[4] Supervision is a special need of the state permitting a degree of impingement upon privacy that would not be constitutional if applied to the public at large, but the permissible degree is not unlimited. 483 U.S. at 875. The "special needs" of a probation system make the warrant system impracticable and justify the replacement of the

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4 The court did not reach the question as to when a police officer could search. In *Griffin*, the police officer reported he thought that the probationer had a gun, but it was the probation officer, not the police, who conducted the search.

standard of probable cause by "reasonable ground." 483 U.S. at 875-76.

In most jurisdictions, the result reached in *Griffin v. Wisconsin* had been a foregone conclusion, with other courts having moved in the direction of requiring at a minimum that a peace officer at least have consulted with a probation officer.[5]

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5 *E.g.*, *State v. Cullison*, 173 N.W.2d 533 (Iowa 1970) (parolee; unreasonable search); *People v. Way*, 319 N.Y.S.2d 16 (New York 1971)(parolee; limited scope); *People v. Peterson*, 233 N.W.2d 250, 254-55 (Mich. 1975) (blanket searches by peace officers unlawful); *Temez v. State*, 534 S.W.2d 686 (Tex. 1976); *State v. McGivney*, 585 P.2d 767 (Ore 1978); *State v. Holm*, 579 P.2d 860 (Ore. 1978) (probation Officer; "any peace officer" too broad); *Dearth v. State*, 390 So.2d 108 (Fla. App., 1980) (conditions of probation; fact that probationer agreed to "unfettered discretion" does not make void condition voluntary); *State v. Fogarty*, 610 P.2d 140 (Mont. 1980) (probation; search condition unconstitutional); *State v. Fields*, 686 P.2d 1379, 1389 (Haw. 1984)(probation; probable cause required); *Commonwealth v. La France*, 525 N.E.2d 379 (Mass. 1988) (search by probation officer); *People v. Hellenthal*, 465 N.W.2d 329 (Mich. 1990); *State v. Gallagher*, 675 P.2d 429 (NM. 1984); *State v. Cumming*, 262 N.W.2d 56 (S.D. 1978) (probation officer consent required); *State v. Gardner*, 619 P.2d 847 (N.M. 1980) (state statute silent; administrative code required probation officer to seek search warrant, but actual condition imposed provided that probation officer could conduct search; search led by probation officer valid); *State v. Perbix*, 331 N.W.2d 14 (ND. 1983) (search consistent with statutes permitting probation officer to search) [see now N.D.C.C. 15A-1343 adopting MPC (j)]. *But see People v. Bravo*, 43 Cal.3d 600 (1987); *Wilson v. State*, 752 S.W.2d 46 (Ark. 1988) [see now A.C.A. § 5-4-303 adopting MPC (j)]; *Allen v. State*, 369 S.E.2d 909 (Ga. 1988) [see now O.C.G.A. § 45-

It would appear that California is the first state ever to expressly authorize "blanket searches" of probationers without a warrant by any peace officer. *People v. Bravo*, 43 Cal.3d 600 (1987). *Bravo*, however, was decided only several days after *Griffin*, and cites *Griffin* only once. 43 Cal.3d at 608. *Bravo* conflicts with *Griffin* in that California has no state detailed regulation of probation, unlike Wisconsin, which authorized a departure from Fourth Amendment warrants. In *Griffin*, there was an objective standard, approved by the Court, which had to be met over and above being a mere parolee, and there were detailed regulations covering the subject.

The Oregon experience is illuminating. The Supreme Court noted that while the courts had the power to impose conditions of probation, and that while a "search and seizure" condition may be appropriate, there was no express legislative authority, such conditions could not be unlimited, that the courts were not the means of defining that limit in the first instance, but did so reluctantly. Evidently the Oregon legislature took the hint because it appears to have enacted legislation permitting a "search and seizure" condition "by the probation officer, or any peace officer assisting the probation officer." *See State v. Hovater*, 588 P.2d 56 (1978); *State v. Davis*, 597 P.2d 1280 (1979).

8-35 adopting MPC (j)]; *State v. Finnegan*, 439 N.W.2d 496 (Neb. 1989) (search "by any peace officer" limited to part of drug rehabilitation program only); *People v. Hellenthal*, 465 N.W.2d 329 (Mich. 1990) (drug search as part of drug rehabilitation program approved). *See generally*, Annotation, *Validity of Requirement that, As Condition of Probation, Defendant Submit to Warrantless Searches*, 79 A.L.R. 3d 1083; Annotation, *Validity, Under Fourth Amendment, of Warrantless Search of Parolee or His Property by Parole Officer*, 32 A.L.R. Fed 155.

The great weight of authority thus holds that neither a parolee nor a probationer may be abused during authorized searches. Given the purpose of probation and parole, the fact that the probation and parole officers know their own charges better than anyone else, and certainly more than a magistrate knows about unknown citizens when issuing a search warrant, the Fourth Amendment requires at a minimum that peace officers contact the parole or probation officer for permission to conduct a search of the parolee or probationer, and no search unless so authorized is valid, absent exigent circumstances, because the administration of conditions of parole and probation are a non-delegable duty necessary to rehabilitate the offender, yet prevent the exploitation of such persons and the abuse of those not on probation. This result is consistent with, and required by, this Court' enunciated rule of law which forbids the granting of "unfettered discretion" to peace officers in the area of law enforcement. *E.g.*, *Florida v. Wells*, 95 U.S. 1 (1990) inventory of containers where no state policy authorizes inventory); *Payton v. New York*, 45 U.S. 573 (1980); Rotunda, CONSTITUTIONAL TREATISE, §§ 20.9, p. 34. It is for the courts to supervise probationers, through the probation office, and not for peace officers, and such a delegation is simply not permitted.

C. California Has No Detailed Rules and Regulations for the Imposition of a Statutory Waiver of The Fourth Amendment

California's legislature has not clearly and unequivocally authorized a condition of probation searches "by any peace officer at any time of the day or night with or without a warrant." P.C., §§

1192.3[6], 1202.7[7], 1202.8[8], 1203[9], 1203.016[10], 1203.1[11],

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6 (a) A plea of guilty or nolo contendere to an accusatory pleading charging a public offense, other than a felony specified in Section 1192.5 or 1192.7, which public offense did not result in damage for which restitution may be ordered, made on the condition that charges be dismissed for one or more public offenses arising from the same or related course of conduct by the defendant which did result in damage for which restitution may be ordered, may specify the payment of restitution by the defendant as a condition of the plea or any probation granted pursuant thereto, so long as the plea is freely and voluntarily made, there is factual basis for the plea, and the plea **and all conditions are approved by the court**....

7 The Legislature finds and declares that the provision of probation services is an essential element in the administration of criminal justice. The safety of the public, which shall be a primary goal through the enforcement of court-ordered conditions of probation; the nature of the offense; the interests of justice, including punishment, reintegration of the offender into the community, and enforcement of conditions of probation; the loss to the victim; and the needs of the defendant shall be the primary considerations in the granting of probation.

8 1202.8. (a) Persons placed on probation by a court shall be under the supervision of the county probation officer who shall determine both the level and type of supervision consistent with the court-ordered conditions of probation. (b) Within 30 days of a court making an order to provide restitution to a victim or to the Restitution Fund, the probation officer shall establish an account into which any restitution payments that are not deposited into the Restitution Fund shall be deposited.

9 1203. (a) As used in this code, "probation" means the suspension of the imposition or execution of a sentence and the order

1210.1[12], 1203.4 (emphases supplied).

There is no basis for the Attorney General's reliance on

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of conditional and revocable release in the community under the supervision of a probation officer. As used in this code, "conditional sentence" means the suspension of the imposition or execution of a sentence and the order of revocable release in the community subject to conditions established by the court without the supervision of a probation officer. It is the intent of the Legislature that both conditional sentence and probation are authorized whenever probation is authorized in any code as a sentencing option for infractions or misdemeanors.

10 See Appendix at C7. Note that this section, involving home detention, permits inspection of hte home. Subdivision (b)(2).

11 See Appendix at C1.

12 1210.1. Possession of Controlled Substances; Probation; exceptions. (a) Notwithstanding any other provision of law, and except as provided in subdivision (b), any person convicted of a nonviolent drug possession offense shall receive probation. As a condition of probation the court shall require participation in and completion of an appropriate drug treatment program. The court may also impose, as a condition of probation, participation in vocational training, family counseling, literacy training and/or community service. A court may not impose incarceration as an additional condition of probation. Aside from the limitations imposed in this subdivision, **the trial court is not otherwise limited in the type of probation conditions it may impose**.

It is interesting that even in drug cases, the legislature has failed to provide explicitly for a statutory waiver of the 4th amendment.

section 1203.1. It is a general grant of authority to administer probation. Unlike 1203.016 and 1203.10, it contains no hint of allowing inspections, let alone searches. Thus, the California courts, in the complete absence of legislative authority, have created a Fourth Amendment waiver, without any apparent safeguards as set forth by this Court in *Griffin*, *supra*. This court's decision in *Colonnade, supra*, is directly on point: absent legislative approval in the first instance, the regulation is void for lack of authority. Moreover, as discussed above, an overwhelming number of state supreme courts agree that such a provision is unlawful.

CONCLUSION

WHEREFORE, for the reasons set forth above, the Court's *amicus* respectfully submits that this Court should deny the Petition for Writ of Certiorari, or grant and summarily affirm the decision of the Ninth Ciruit Court of Appeals *per curiam*. *E.g.*, *Ohio v. Reiner*, S.Ct. No. 00-1028 (3/19/01) *(per curiam)*.

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Dated: April 4, 2001

APPENDIX A

4 U.S.C. § 112 (2001)

Ala. Code 1975 § 15-22-1

Alaska Stat. §§ 33.36.110, 33.36.120

Ariz. R.S. §§ 31-461 to 31-465

Ark. C.A. §§ 16-93-901 to 16-93-903

Cal. Pen. C. §§ 11175 to 11179

Colo. R.S.A. §§ 24-60-301 to 24-60-309

Conn. G.S.A. §§ 54-132 to 54-138

Del. Code 11 §§ 4358, 4359

D.C. Code 1981, §§ 24-251 to 24-253

Fla. S.A. §§ 949.07 to 949.07

Ga. Official Code §§ 49-2-70, 49-2-71

Hawaii R.S. §§ 353-81, 353-82

Idaho Code §§ 20-301, 20-302

Ill. S.H.A. 730 ILCS 5/3-3-11

Ind. A.C. §§ 11-13-4-1, 11-13-4-2

Iowa C.A. § 907A.1

Kan. S.A. § 22-4101, et seq.

Ky. RS § 439.560

La. SA-R.S. § 15:574.14

Me. 34-A.R.S.A.§§ 9801, et seq.

Md. Code 1957, art. 41, §§ 4-801 to 4-803

Mass. G.L.A. c. 127, §§ 151A to 151G

Mich. C.L.A. §§ 798.101 to 798.103

Minn. S.A. § 243.16

Miss. Code 1972 § 47-7-71

Mo. V.A.M.S. § 217.810

Mont. C.A. §§ 46-23-1101 to 46-23-1106

Neb. R.R.S. 1943, §§ 29-2637 to 29-2638

Nev. R.S. §§ 213.180 to 213.210

N.H. RSA § 651-A:25

N.J.S.A. §§ 2A:168-14 to 2A:168-17

N.M.S.A. 1978 §§ 31-5-1 to 31-5-2

N.Y. Executive Law § 259-m

N.C.G.S. §§ 148-65.1 to 148-65.2

N.D.C.C. §§ 12-56-01, 12-56-02

Ohio R.C. §§ 5149.17 to 5149.23

57 Okl. St. Ann. §§ 347 to 349

Ore. RS §§ 144.610 to 144.620

Penn. Stat. 61 §§ 321, 322;

Puerto Rico 4 L.P.R.A. §§ 637 to 639

R.I Gen. Laws 1956, §§ 13-9-1 to 13-9-2

S.C. Code 1976, §§ 24-21-810 to 24-21-830

S.D.C.L. §§ 24-16-1 to 24-16-5

Tenn. C.A. § 40-28-401

Tex. Ann. C.C.P. art. § 42.11

Utah C.A. 1953, §§ 77-27-24 to 77-27-31

Vt. Stat. Ann. 28 § 1301

Virgin Islands Code 5 §§ 4631 to 4633

Va. Code 1950, §§ 53.1-166, 53.1-167

Wash. Rev. Code § 9.95.270

W.Va. Code, 28-6-1, 28-6-2

Wis. S.A. 304.13

Wyo. S.1977, §§ 7-13-412 to 7-13-417.

APPENDIX B

Section 1: Jurisdictions incorporating Model Penal Code § 301.1(2)(j), requiring probationers "to report as directed to the Court or the probation officer and to permit the officer to visit his home; ....":

Ark Code Ann. § 5-4-303

Ga. O.C.G.A. § 45-8-35

Ind. A.I.C. 35-38-2-2.3

Kan. S.A. 21-4610

Ky. RS 533.030

La R.S. 15:574.4

Me. R.S.A. § 1204

Neb. R.R.S. 1993, § 29-2262

N.J.S.A. 2C:45-1

N.Y Penal Law § 65.10

Pa. Stat. 4 § 9754

Section 2: Jurisdictions incorporating Model Penal Code § 301.1(2)(j) and adding "and elsewhere:"

18 USC, § 3563

Colo. R.S.A. § 16-11-204(i)

Fla. S.A. § 948.03

Hawaii RS § 706-624

Ill. CS 5/3-6-3 S.H.A. 730

Miss. Code 1972, § 47-7-35

N.D.C.C. § 12.1-32-07 [limited to reasonable times]

Ore. RS § 137.540

Vt. Stat. 28 § 252 [limited to reasonable times]

Section 3: Jurisdictions incorporating Model Penal Code § 301.1(2)(l), requiring probationers "to satisfy any other conditions reasonably related to the rehabilitation of the defendant and not unduly restrictive of his liberty or incompatible with his freedom of conscience:"

18 USC, § 3563

Ark Code Ann. § 5-4-303

Hawaii RS § 706-624

Ill. CS 5/3-6-3 S.H.A. 730

N.J.S.A. 2C:45-1

Pa. Stat. 4 § 9754

Section 4: Jurisdictions with detailed procedures for warrantless searches by a probation officer:

Ill. CS 5/3-6-3 S.H.A. 730

N.C.G.S. § 15A-1343

Section 5: Jurisdictions which expressly provide for drug testing:

18 USC, § 3563

18 USC, § 3563

Ariz. R.S. §13-914

Fla. S.A. § 948.03

Hawaii RS § 706-624

Ill. CS 5/3-6-3 S.H.A. 730

Ind. A.I.C. 35-38-2-2.3

Me. R.S.A. § 1204

Miss. Code 1972, § 47-7-35

Neb. R.R.S. 1993, § 29-2262

Nev. .R.S. 176.185 to 176.227

N.D.C.C. § 12.1-32-07

Ore. RS § 137.540

Puerto Rico Law 34 § 1027a

Tex. Ann. C.Cr.P. art. 42.12, § 11

Section 6: Jurisdictions silent on the issues of consent to search:

Ala. Code 1975, § 15-22-29

Alaska Stat. § 12.55.100

Ariz. R.S. §§ 12-299, et seq.

Cal. Pen. C. §§ 11175 to 11179

Conn. G.S.A. § 53a-30

Del. Code 11 § 4332

D.C. Code 1981, §§ 24-101 to 24-106

Idaho C. §§ 19-2601 to 19-2607

Iowa C.A. § 907.6

Md. Code 1957, art. 27, § 641, 641A

Mass. G.L.A. c. 276, § 387, 387A

Mich. C.L.A. § 771.3

Minn. S.A. § 609.135

Mo. V.A.M.S. § 217.705

Mont. CA §§ 46-1-202, 46-18-201, 46-23-1001

N.H. RSA 651:2

N.M.S.A. 1978, § 31-21-21

Ohio R.C. § 2951.02

Okl. St.Ann. 22 § 991a

R.I. Gen. Laws 1956, §§ 12-19-8, 21-28-4.21

S.C. Code 1976 § 24-21-430

S.D.C.L. § 23A-27-18

Tenn.C.A. § 40-35-303

Utah. Code 1953 § 77-18-1

Virgin Islands Code 5 § 3711

Va. Code 1950, § 19.2-303

Wash. Rev. Code § 9-95-210

W.Va. Code § 62-12-9

Wis. S.A. § 973.09

Wyo. Stat.1977 § 7-13-30

APPENDIX C

1203.1. (a) The court, or judge thereof, in the order granting probation, may suspend the imposing or the execution of the sentence and may direct that the suspension may continue for a period of time not exceeding the maximum possible term of the sentence, except as hereinafter set forth, and upon those terms and conditions as it shall determine. The court, or judge thereof, in the order granting probation and as a condition thereof, may imprison the defendant in a county jail for a period not exceeding the maximum time fixed by law in the case. However, where the maximum possible term of the sentence is five years or less, then the period of suspension of imposition or execution of sentence may, in the discretion of the court, continue for not over five years. The following shall apply to this subdivision:

(1) The court may fine the defendant in a sum not to exceed the maximum fine provided by law in the case.

(2) The court may, in connection with granting probation, impose either imprisonment in a county jail or a fine, both, or neither.

(3) The court shall provide for restitution in proper cases. The restitution order shall be fully enforceable as a civil judgment forthwith and in accordance with Section 1202.4 of the Penal Code.

(4) The court may require bonds for the faithful observance and performance of any or all of the conditions of probation.

(b) The court shall consider whether the defendant as a condition of probation shall make restitution to the victim or the Restitution Fund. Any restitution payment received by a probation department in the form of cash or money order shall be forwarded to the victim within 30 d ys from the date the payment is received by the department. Any restitution payment received by a probation department in the form of a check or draft shall be forwarded to the victim within 45 days from the date the payment is received by the department, provided, that payment need not be forwarded to a victim until 180 days from the date the first payment is received, if the restitution payments for that victim received by the probation department total less than fifty dollars ($50). In cases where the court has ordered the defendant to pay restitution to multiple victims and where the administrative cost of disbursing restitution payments to multiple victims involves a significant cost, any restitution payment received by a probation department shall be forwarded to multiple victims when it is cost-effective to do so, but in no event shall restitution disbursements be delayed beyond 180 days from the date the payment is received by the probation department.

(c) In counties or cities and counties where road camps, farms, or other public work is available the court may place the probationer in the road camp, farm, or other public work instead of in jail. In this case, Section 25359 of the Government Code shall apply to probation and the court shall have the same power to require adult probationers to work, as prisoners confined in the county jail are required to work, at public work. Each county board of supervisors may fix the scale of compensation of the adult probationers in that county.

(d) In all cases of probation the court may require as a condition of probation that the probationer go to work and earn money for

the support of his or her dependents or to pay any fine imposed or reparation condition, to keep an account of his or her earnings, to report them to the probation officer and apply those earnings as directed by the court.

(e) The court shall also consider whether the defendant as a condition of probation shall make restitution to a public agency for the costs of an emergency response pursuant to Article 8 (commencing with Section 53150) of Chapter 1 of Part 1 of Division 2 of the Government Code.

(f) In all felony cases in which, as a condition of probation, a judge of the superior court sitting by authority of law elsewhere than at the county seat requires a convicted person to serve his or her sentence at intermittent periods the sentence may be served on the order of the judge at the city jail nearest to the place at which the court is sitting, and the cost of his or her maintenance shall be a county charge.

(g) (1) The court and prosecuting attorney shall consider whether any defendant who has been convicted of a nonviolent or nonserious offense and ordered to participate in community service as a condition of probation shall be required to engage in the removal of graffiti in the performance of the community service. For the purpose of this subdivision, a nonserious offense shall not include the following:

(A) Offenses in violation of the Dangerous Weapons Control Law (Chapter 1 (commencing with Section 12000) of Title 2 of Part 4).

(B) Offenses involving the use of a dangerous or deadly

weapon, including all violations of Section 417.

(C) Offenses involving the use or attempted use of violence against the person of another or involving injury to a victim.

(D) Offenses involving annoying or molesting children.

(2) Notwithstanding subparagraph (A) of paragraph (1), any person who violates Section 12101 shall be ordered to perform not less than 100 hours and not more than 500 hours of community service as a condition of probation.

(3) The court and the prosecuting attorney need not consider a defendant pursuant to paragraph (1) if the following circumstances exist:

(A) The defendant was convicted of any offense set forth in subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7.

(B) The judge believes that the public safety may be endangered if the person is ordered to do community service or the judge believes that the facts or circumstances or facts and circumstances call for imposition of a more substantial penalty.

(h) The probation officer or his or her designated representative shall consider whether any defendant who has been convicted of a nonviolent and nonserious offense and ordered to participate in community service as a condition of probation shall be required to engage in the performance of house repairs or yard services for senior citizens and the performance of repairs to senior centers

through contact with local senior service organizations in the performance of the community service.

(i) (1) Upon conviction of any offense involving child abuse or neglect, the court may require, in addition to any or all of the above-mentioned terms of imprisonment, fine, and other reasonable conditions, that the defendant shall participate in counseling or education programs, or both, including, but not limited to, parent education or parenting programs operated by community colleges, school districts, other public agencies, or private agencies.

(2) Upon conviction of any sex offense subjecting the defendant to the registration requirements of Section 290, the court may order as a condition of probation, at the request of the victim or in the court's discretion, that the defendant stay away from the victim and the victim's residence or place of employment, and that the defendant have no contact with the victim in person, by telephone or electronic means, or by mail.

(j) The court may impose and require any or all of the above-mentioned terms of imprisonment, fine, and conditions, and other reasonable conditions, as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and generally and specifically for the reformation and rehabilitation of the probationer, and that should the probationer violate any of the terms or conditions imposed by the court in the matter, it shall have authority to modify and change any and all the terms and conditions and to reimprison the probationer in the county jail within the limitations of the penalty of

the public offense involved. Upon the defendant being released from the county jail under the terms of probation as originally granted or any modification subsequently made, and in all cases where confinement in a county jail has not been a condition of the grant of probation, the court shall place the defendant or probationer in and under the charge of the probation officer of the court, for the period or term fixed for probation. However, upon the payment of any fine imposed and the fulfillment of all conditions of probation, probation shall cease at the end of the term of probation, or sooner, in the event of modification. In counties and cities and counties in which there are facilities for taking fingerprints, those of each probationer shall be taken and a record of them kept and preserved.

(k) Notwithstanding any other provisions of law to the contrary, except as provided in Section 13967, as operative on or before September 28, 1994, of the Government Code and Section 13967.5 of the Government Code and Sections 1202.4, 1463.16, paragraph (1) of subdivision (a) of Section 1463.18, and Section 1464, and Section 1203.04, as operative on or before August 2, 1995, all fines collected by a county probation officer in any of the courts of this state, as a condition of the granting of probation or as a part of the terms of probation, shall be paid into the county treasury and placed in the general fund for the use and benefit of the county.

(l) If the court orders restitution to be made to the victim, the board of supervisors may add a fee to cover the actual administrative cost of collecting restitution but not to exceed 10 percent of the total amount ordered to be paid. The fees shall be paid into the general fund of the county treasury for the use and benefit of the county.

1203.016. (a) Notwithstanding any other provision of law, the board of supervisors of any county may authorize the correctional administrator, as defined in subdivision (h), to offer a program under which minimum security inmates and low-risk offenders committed to a county jail or other county correctional facility or granted probation, or inmates participating in a work furlough program, may voluntarily participate in a home detention program during their sentence in lieu of confinement in the county jail or other county correctional facility or program under the auspices of the probation officer.

(b) The board of supervisors may prescribe reasonable rules and regulations under which a **home detention program** may operate. As a condition of participation in the home detention program, the inmate shall give his or her consent in writing to participate in the home detention program and shall in writing agree to comply with the rules and regulations of the program, including, but not limited to, the following rules:

(1) The participant shall remain within the interior premises of his or her residence during the hours designated by the correctional administrator.

(2) The participant shall admit any person or agent designated by the correctional administrator into his or her residence at any time for purposes of verifying the participant's compliance with the conditions of his or her detention.

(3) The participant shall agree to the use of electronic monitoring or supervising devices for the purpose of helping to verify his or her compliance with the rules and

regulations of the home detention program. The devices shall not be used to eavesdrop or record any conversation, except a conversation between the participant and the person supervising the participant which is to be used solely for the purposes of voice identification.

(4) The participant shall agree that the correctional administrator in charge of the county correctional facility from which the participant was released may, without further order of the court, immediately retake the person into custody to serve the balance of his or her sentence if the electronic monitoring or supervising devices are unable for any reason to properly perform their function at the designated place of home detention, if the person fails to remain within the place of home detention as stipulated in the agreement, if the person willfully fails to pay fees to the provider of electronic home detention services, as stipulated in the agreement, subsequent to the written notification of the participant that the payment has not been received and that return to custody may result, or if the person for any other reason no longer meets the established criteria under this section. A copy of the agreement shall be delivered to the participant and a copy retained by the correctional administrator.

(c) Whenever the peace officer supervising a participant has reasonable cause to believe that the participant is not complying with the rules or conditions of the program, or that the electronic monitoring devices are unable to function properly in the designated place of confinement, **the peace officer may, under general or specific authorization of the correctional administrator, and without a warrant of arrest, retake the person into custody to**

complete the remainder of the original sentence.

(d) Nothing in this section shall be construed to require the correctional administrator to allow a person to participate in this program if it appears from the record that the person has not satisfactorily complied with reasonable rules and regulations while in custody. A person shall be eligible for participation in a home detention program only if the correctional administrator concludes that the person meets the criteria for release established under this section and that the person's participation is consistent with any reasonable rules and regulations prescribed by the board of supervisors or the administrative policy of the correctional administrator.

(1) The rules and regulations and administrative policy of the program shall be written and reviewed on an annual basis by the county board of supervisors and the correctional administrator. The rules and regulations shall be given to or made available to any participant upon request.

(2) The correctional administrator, or his or her designee, shall have the sole discretionary authority to permit program participation as an alternative to physical custody. All persons referred or recommended by the court to participate in the home detention program pursuant to subdivision (e) who are denied participation or all persons removed from program participation shall be notified in writing of the specific reasons for the denial or removal. The notice of denial or removal shall include the participant's appeal rights, as established by program administrative policy.

(e) The court may recommend or refer a person to the correctional administrator for consideration for placement in the home detention program. The recommendation or referral of the court shall be given great weight in the determination of acceptance or denial. At the time of sentencing or at any time that the court deems it necessary, the court may restrict or deny the defendant's participation in a home detention program.

(f) The correctional administrator may permit home detention program participants to seek and retain employment in the community, attend psychological counseling sessions or educational or vocational training classes, or seek medical and dental assistance. Willful failure of the program participant to return to the place of home detention not later than the expiration of any period of time during which he or she is authorized to be away from the place of home detention pursuant to this section and unauthorized departures from the place of home detention are punishable as provided in Section 4532.

(g) The board of supervisors may prescribe a program administrative fee to be paid by each home detention participant that shall be determined according to his or her ability to pay. Inability to pay all or a portion of the program fees shall not preclude participation in the program, and eligibility shall not be enhanced by reason of ability to pay. All program administration and supervision fees shall be administered in compliance with Section 1208.2.

(h) As used in this section, the following words have the following meanings:

(1) "Correctional administrator" means the sheriff,

probation officer, or director of the county department of corrections.

(2) "Minimum security inmate" means an inmate who, by established local classification criteria, would be eligible for placement in a Type IV local detention facility, as described in Title 15 of the California Code of Regulations, or for placement into the community for work or school activities, or who is determined to be a minimum security risk under a classification plan developed pursuant to Section 1050 of Title 15 of the California Code of Regulations.

(3) "Low-risk offender" means a probationer, as defined by the National Institute of Corrections model probation system.

(i) Notwithstanding any other law, the police department of a city where an office is located to which persons on an electronic monitoring program report may require the county correctional administrator to provide information concerning those persons. This information shall be limited to the name, address, date of birth, and offense committed by the home detainee. Any information received by a police department pursuant to this paragraph shall be used only for the purpose of monitoring the impact of home detention programs on the community.

(j) It is the intent of the Legislature that home detention programs established under this section maintain the highest public confidence, credibility, and public safety. In the furtherance of these standards, the following shall apply:

(1) The correctional administrator, with the approval of the board of supervisors, may administer a home detention program pursuant to written contracts with appropriate public or private agencies or entities to provide specified program services. No public or private agency or entity may operate a home detention program in any county without a written contract with that county's correctional administrator. However, this does not apply to the use of electronic monitoring by the California Department of Corrections or the Department of the Youth Authority as established in Section 3004. No public or private agency or entity entering into a contract may itself employ any person who is in the home detention program.

(2) Program acceptance shall not circumvent the normal booking process for sentenced offenders. All home detention program participants shall be supervised.

(3) (A) All privately operated home detention programs shall be under the jurisdiction of, and subject to the terms and conditions of the contract entered into with, the correctional administrator.

(B) Each contract shall include, but not be limited to, all of the following:

(i) A provision whereby the private agency or entity agrees to operate in compliance with any available standards promulgated by state correctional agencies and bodies, including the Board of Corrections, and all statutory provisions and mandates, state and county, as appropriate

and applicable to the operation of home detention programs and the supervision of sentenced offenders in a home detention program.

(ii) A provision that clearly defines areas of respective responsibility and liability of the county and the private agency or entity.

(iii) A provision that requires the private agency or entity to demonstrate evidence of financial responsibility, submitted and approved by the board of supervisors, in amounts and under conditions sufficient to fully indemnify the county for reasonably foreseeable public liability, including legal defense costs, that may arise from, or be proximately caused by, acts or omissions of the contractor. The contract shall provide for annual review by the correctional administrator to ensure compliance with requirements set by the board of supervisors and for adjustment of the financial responsibility requirements if warranted by caseload changes or other factors.

(iv) A provision that requires the private agency or entity to provide evidence of financial responsibility, such as certificates of insurance or copies of insurance policies, prior to commencing any operations pursuant to the contract or at any time requested by the board of supervisors or correctional administrator.

(v) A provision that permits the correctional

administrator to immediately terminate the contract with a private agency or entity at any time that the contractor fails to demonstrate evidence of financial responsibility.

(C) All privately operated home detention programs shall comply with all appropriate, applicable ordinances and regulations specified in subdivision (a) of Section 1208.

(D) The board of supervisors, the correctional administrator, and the designee of the correctional administrator shall comply with Section 1090 of the Government Code in the consideration, making, and execution of contracts pursuant to this section.

(E) The failure of the private agency or entity to comply with statutory provisions and requirements or with the standards established by the contract and with the correctional administrator may be sufficient cause to terminate the contract.

(F) Upon the discovery that a private agency or entity with whom there is a contract is not in compliance pursuant to this paragraph, the correctional administrator shall give 60 days' notice to the director of the private agency or entity that the contract may be canceled if the specified deficiencies are not corrected.

(G) Shorter notice may be given or the contract may be canceled without notice whenever a serious threat to public safety is present because the private agency or entity has failed to comply with this section.

(k) For purposes of this section, "evidence of financial responsibility" may include, but is not limited to, certified copies of any of the following:

(1) A current liability insurance policy.
(2) A current errors and omissions insurance policy.
(3) A surety bond.

Supreme Court, U.S.
FILED
JUL 12 2001

No. 00-1260

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MARK JAMES KNIGHTS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED: FEB. 2, 2001
CERTIORARI GRANTED: MAY 14, 2001

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA
(SAN FRANCISCO)

No. 99-CR-108-ALL

UNITED STATES OF AMERICA, PLAINTIFF

v.

MARK JAMES KNIGHTS; STEVEN SIMONEAU,
DEFENDANTS

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
3/23/99	1	COMPLAINT Mark James Knight (1) count(s) cmp Mag. Judge Elizabeth D. Laporte [3:99-m-30116] (lsk) [Entry date 03/25/99]
3/23/99	1	COMPLAINT Steven Simoneau (1) count(s) cmp Mag. Judge Elizabeth D. Laporte [3:99-m-30117] (lsk) [Entry date 03/25/99]
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
4/6/99	9	INDICTMENT by AUSA Martha A. Boersch. Counts filed against Mark James Knight (1) count(s) 1, 2, Steven Simoneau (2) count(s) 1, 3 (lsk) [Entry date 04/06/99]
		* * * * *
6/24/99	25	Notice of motion and MOTION before Judge Martin J. Jenkins to suppress seized evidence by defendant Mark James Knights (lsk) [Entry date 06/28/99]
		* * * * *
7/8/99	29	OPPOSITION by Plaintiff USA to motion to suppress seized evidence by defendant Mark James Knights [25-1] (lsk) [Entry date 07/12/99]
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
11/1/99	48	MINUTES: filed on 11/3/99 before Judge Martin J. Jenkins; status hearing will be held at 1:30 11/8/99 for Mark James Knights, for Steven Simoneau before Judge Martin J. Jenkins. Deft Simoneau motion to suppress granted/denied in part. Deft Knight motion to suppress granted/denied in part. Time excluded to next appearance. (C/R: Lydia Radovich) (lsk) [Entry date 11/04/99]
		* * * * *
11/8/99	52	NOTICE OF APPEAL by Plaintiff USA from Dist. Court decision minutes [48-2] as to defendant Mark James Knights, defendant Steven Simoneau Fee status Govt appeal (lsk) [Entry date 11/09/99]
		* * * * *

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 99-10538

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

MARK JAMES KNIGHTS, DEFENDANT-APPELLEE;
STEVEN SIMONEAU, DEFENDANT-APPELLEE

DOCKET ENTRIES

DATE	DOCKET ENTRY
	* * * * *
2/14/00	Filed original and 15 copies Appellant USA opening brief (Informal: no) 29 pages and five excerpts of record served on 2/8/00 [99-10538] (wp)
	* * * * *
3/28/00	Filed original and 15 copies appellee Mark James Knights's 34 pages [*sic*] brief, 5 supplemental Exc. served on 3/27/00 [99-10538] (wp)
3/30/00	14 day oral extension by phone of time to file Appellant's reply brief. [99-10538] appellants' reply brief due 4/27/00; (cb)

DATE	DOCKET ENTRY
	* * * * *
4/28/00	Filed original and 15 copies USA reply brief, (Informal: no) 15 pages; served on 4/27/00 [99-10538] (wp)
	* * * * *
7/11/00	ARGUED AND SUBMITTED TO William C. CANBY, Stephen R. REINHARDT, Ferdinand F. FERNANDEZ [99-10538] (sa)
8/3/00	FILED OPINION: AFFIRMED (Terminated on the Merits after Oral Hearing; Affirmed; Written, Unsigned, Unpublished. William C. CANBY; Stephen R. REINHARDT; Ferdinand F. FERNANDEZ, author.) FILED AND ENTERED JUDGMENT. [99-10538] (wp)
	* * * * *
8/31/00	Filed original and 50 copies Appellant USA petition for rehearing with suggestion for rehearing en banc 19 p.pages, served on 8/31/00 PANEL AND ALL ACTIVE JUDGES [99-10538] (ft)
	* * * * *

DATE	DOCKET ENTRY
10/5/00	Filed order (William C. CANBY, Stephen R. REINHARDT, Ferdinand F. FERNANDEZ,): The petition for rehearing and petition for rehearing en banc are denied. [99-10538] (wp)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. CR-99-0108

UNITED STATES OF AMERICA, PLAINTIFF

v.

MARK JAMES KNIGHTS AND STEVEN SIMONEAU, DEFENDANTS

INDICTMENT

The Grand Jury charges:

COUNT ONE: (18 U.S.C. § 371 – Conspiracy)

On or about and between May 24, 1998, and June 3, 1998, both dates being approximate and inclusive, in the Northern District of California, and elsewhere, the defendants

MARK JAMES KNIGHTS and
STEVEN SIMONEAU

did knowingly and intentionally combine, conspire, and agree together, to commit the following offense against the United States: arson in violation of Title 18, United States Code, Section 844(i).

MANNER AND MEANS

a. It was part of the manner and means of the conspiracy that defendants Mark James Knights and

Steven Simoneau possessed ammunition, explosive powder, detonation cords, and other materials that could be assembled into pipe bombs or other explosive or incendiary devices with the intent to use those devices to destroy or damage property;

b. It was further part of the manner and means of the conspiracy that the defendants Mark James Knights and Steven Simoneau intended to use the explosive or incendiary devices to damage or destroy property owned by Pacific Gas & Electric Company in Napa County, California.

c. It was further part of the manner and means of the conspiracy that the defendants Mark James Knights and Steven Simoneau intended to use the explosive or incendiary devices to damage or destroy commercial property located in the City of Napa.

OVERT ACTS

2. In furtherance of this conspiracy and to effect and accomplish the objects of it, one or more of the conspirators committed the following overt acts:

a. On or about May 24, 1998, adjacent to a PG&E gas line located at Highway 29 and Zinfandel Lane, defendants Mark James Knights and Steven Simoneau were driving a red 1990 Toyota pick-up, which contained numerous pipes, pieces of chain, and other equipment, including gasoline.

b. On or about June 3, 1998, defendant Mark James Knights possessed numerous rounds of ammunition, including 173 rounds of M-60 machine gun ammunition with 34 rounds of tracer ammunition, 34 rounds of .32

caliber ammunition, and 38 rounds of nine millimeter ammunition; detonation cord; numerous books and manuals instructing in chemical reactions, physics, electronics, and assembly of circuit applications; chemical liquids; and various tools, including bolt cutters, metal levers, and a set of telephone pole climbing spurs similar to those used by utility workers.

c. On or about June 3, 1998, defendant Steven Simoneau possessed flammable liquids, containers labeled Pirodex black powder, a plastic bulb containing an explosive black powder, black electrical tape, a diagram of an electric device, shotgun shells, green colored fuse, cutting instruments, chains, locks indicating PG&E ownership, white pipe, pieces of wax, propane tanks with holes drilled in the side, and PG&E master keys.

All in violation of Title 18, United States Code, Section 371.

COUNT TWO: (18 U.S.C. § 922(g)(1)—Felon in Possession)

On or about June 3, 1998, in the Northern District of California, the defendant

MARK JAMES KNIGHTS,

having previously been convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess ammunition, to wit, 173 rounds of M-60 machine gun ammunition with 34 rounds of tracer ammunition; 34 rounds of .32 caliber ammunition; and 38 rounds of nine millimeter ammunition, in and

affecting commerce, in violation of Title 18, United States Code, Section 922(g)(1).

COUNT THREE: (26 U.S.C. § 5861(d)—Possession of Unregistered Firearm)

On or about June 3, 1998, in the Northern District of California, the defendant

STEVEN SIMONEAU

knowingly received and possessed a firearm as defined in 26 U.S.C. § 5845(a)(8) and (f), to wit: a destructive device (Molotov cocktail), which was not registered to him in the National Firearms Registration and Transfer Record, in violation of Title 26, United States Code, Sections 5841, 5861(d), and 5871.

DATED: A TRUE BILL.

_____
FOREPERSON

ROBERT S. MUELLER, III
United States Attorney

/s/ [Illegible]
DAVID W. SHAPIRO
Chief, Criminal Division

(Approved as to form: /s/ M. Boersch)
AUSA BOERSCH

STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

AFFIDAVIT

I, William White, after being duly sworn, do state the following:

1. I have been a sworn California Peace Officer since 1973 and since 1996 have been employed with the Napa County District Attorney's Office as an investigator assigned to crimes against persons.

2. The information contained in this affidavit is based upon my own investigation as well as upon information I learned from other law enforcement officers, including Detective Todd Hancock of the Napa County Sheriff's Office.

BACKGROUND

3. On March 1, 1996, Mark Knight resided at 2164 Ethel Porter Drive within the unincorporated area of Napa County, California. On that date Pacific Gas & Electric Company disconnected Mr. Knight's power service due to nonpayment of his monthly bill. On March 4, 1996, PG&E personnel removed the electric meter and disconnected the service wires at the pole location due to an illegal electrical bypass connected at the weather head on top of the roof at 2164 Ethel Porter Drive.

4. PG&E reported a total loss at the time of $1,157.65 billed to Mark Knight. A complaint was filed with the Napa County District Attorney's Office on

May 21, 1996 requesting charges of California Penal Code 498, theft of utility services of over $400.00, a felony.

5. Between September 3, 1996, and June 2, 1998, PG&E investigators reported over thirty vandalisms to PG&E property located in Napa, California. The last instance, on June 2, 1998, was an arson fire at a PG&E and Pacific Bell telecommunications vault located on Devlin Road near the Napa County Airport, which caused power and telephone loss for several thousand customers.

6. On May 24, 1998 Mark Knight and Steven Simoneau were stopped by an on duty Napa County Sheriff's Deputy adjacent to a PG&E gas line located at Hwy. 29 and Zinfandel Lane. Simoneau's vehicle, a red 1990 Toyota pick-up contained numerous pipes, pieces of chain, and other equipment, including gasoline. A request by the deputy to search a vehicle was refused and both Knight and Simoneau were released.

7. On the weekend of May 30-31, 1998 a business located at 550 Main Street, known as the Hatt Building, was burglarized. Photographs and blueprints were taken and the Napa Police Department took a burglary report. Approximately during this time a pipe bomb was detonated at the exterior of the Hatt Building utilizing Pirodex smokeless powder and a detonation cord. Evidence recovered from the scene was booked to evidence and referred to the ATF for analysis. At the time of the arson fire to the Pacific Bell and PG&E vaults and the burglary and detonation of the explosive device at the Hatt Building, Mark Knight resided at 538 Brown Street, Apt. 6, Napa. This apartment is

approximately 600 feet south of the Hatt Building and the location of the exploded pipe bomb.

8. On May 8, 1996, Mark Knight was arrested by Napa County Sheriff's deputies for felony threats (422 of the California Penal Code), possession of a firearm (12021(a)(1) of the California Penal Code), and possession of an explosive devise to wit a pipe bomb (violation of 12303 of the California Penal Code). In that instance the former girlfriend of Mark Knight reported an "unwanted subject" at 2164 Ethel Porter Drive. She identified the subject as Mark Knight. According to her report, Mark Knight fled prior to deputies arriving. Deputies subsequently located the pipe bomb and the projectile explosive weapon in the back yard of the residence. The case was forwarded to the Napa County District Attorney for prosecution.

9. On August 14, 1996 deputies responded to 2163 Ethel Porter Drive to investigate a reported explosion in the area. Deputies located evidence of an exploded pipe bomb at 2164 Ethel Porter, the residence of Mark Knight. Deputies recovered remnants of an exploded pipe bomb in the street nearby. Evidence was submitted for latent finger print development with no useable prints developed. No charges were filed on this case.

THE JUNE 3, 1998 SEARCH OF 538 BROWN STREET, APT. 6, NAPA, CA

10. At approximately 0435 hrs. on June 2, 1998, a PG&E power transformer and a Pacific Bell controlled environmental vault located on Devlin Road and servicing the Napa County Airport Facility were pried open. An incendiary device using a gasoline accelerant

was used to ignite a fire within the Pacific Bell Vault causing an estimated 1.5 million dollars in damage and eliminating telephone service to the airport area. Access was gained to these two facilities by moving the brass padlocks located on the external areas and prying them off with an unknown means. The locks were not located at the scene.

11. Based upon the above information and the June 2 arson of the Pacific Bell and PG&E vaults located at the Napa County Airport, Mark Knight and Steven Simoneau were considered potential suspects. A surveillance was initiated of 538 Brown Street, the residence of Mark Knight.

12. On June 3, 1998 at approximately 0145 hours Detective Todd Hancock of the Napa County Sheriff's Department observed the 1990 red Toyota pick-up known to belong to Steve Simoneau approach the exterior of 538 Brown Street and park. Detective Hancock observed subjects known to him as Steven Simoneau and Mark Knight exit the vehicle, Simoneau from the driver's door and Knight from the passenger's door. Detective Hancock observed Simoneau remove items from the bed of the truck and both Knight and Simoneau enter the apartment complex. Shortly after Detective Hancock observed the light to Knights upstairs apartment illuminate. At approximately 0310 hours Detective Hancock observed the light turn off.

13. Detective Hancock then observed Steven Simoneau exit the building and approach his vehicle. Simoneau was carrying three cylinder shaped objects approximately three feet in length and cradled in his arms, as well as an object resembling a jar. Simoneau approached the rear of his vehicle and placed the jar

within the bed of the pickup truck. Simoneau then walked across the street to the banks of the Napa River carrying the cylinder shaped items, and while Simoneau was temporarily out of Detective Hancock's line of sight, Detective Hancock distinctly heard the sounds of three splashes coming from the area that he observed Simoneau near the Napa River. Approximately 20 seconds later, Simoneau reentered my line of sight and Detective Hancock noticed that he was no longer carrying the cylinder shaped items.

14. Detective Hancock watched Simoneau again approach his truck and pick up an object that resembled a glass jar from the bed of the truck. Detective Hancock observed him wipe off the jar with a white cloth towel or T-shirt and replace the jar into the bed of the truck. He then observed Simoneau enter the driver's side of the vehicle, start the truck and drive away.

15. Detective Hancock followed Simoneau to an area in a rural unincorporated area of Napa County where he observed Simoneau pull into a driveway located at 5150 Wild Horse Valley Road. Simoneau was known to do part time work and/or reside occasionally at that address. Detective Hancock contacted patrol units to report to that area and approximately twenty minutes later they located the red Toyota truck belonging to Steven Simoneau parked in the driveway of 5150 Wild Horse Valley Road. Simoneau was not present. A subsequent search for Simoneau was fruitless.

16. Within the open bed of the truck in plain view Detective Hancock observed a clear, glass jar containing a cloudy liquid substance and noted that a white cloth was inserted into the liquid and protruded from

the top of the bottle. Detective Hancock smelled the distinctive odor of gasoline emanating from the area of the bottle. He recognized the device from training and experience as an explosive device commonly referred to as a Molotov cocktail. In plain view on the floor of the truck cab on the passengers side he observed two brass padlocks, which appeared similar to the type described by Pacific Bell and PG&E representative as having been used to secure the utility boxes involved in the arson incident on Devlin Road in Napa County near the airport. Explosive experts were called to the scene and the suspected explosive devices was rendered safe and the vehicle was then impounded and a search warrant was subsequently prepared for the search of the vehicle.

17. Believing additional evidence would be contained within the residence of Mark Knight and knowing that Mark Knight had a previous history of possessing explosive devices and fleeing from law enforcement personnel, Detective Hancock believed that the potential for Mark Knight to dispose of or destroy evidence was substantial.

18. Knowing that Mark Knight was currently on felony probation with the county of Napa and was required to submit his person, vehicle, or residence to search and seizure by any time by law enforcement personnel with or without probable cause, Detective Hancock and others returned to Mark Knight's residence at approximately 0800 hours for the purpose of conducting a probation search. Upon entry Mark Knight was located lying in bed with a female identified as Kathy Brown.

19. A subsequent search of the residence, described as a single room apartment, with no plumbing facilities, triangular in shape, approximately 12-14 feet at its longest point and 10 feet wide, was conducted. Located within the residence were items seized as evidence including a coil of pink detonation cord, commonly used to initiate explosive reactions. Detective Hancock observed that the detonation cord was similar to remnants of cord recovered from the bombing two nights previous at the Hatt Building. Also located within the apartment were numerous rounds of ammunition including 173 rounds of M-60 machine gun ammunition, including 34 rounds of tracer ammunition, 34 rounds of .32 caliber ammunition, and 38 rounds of nine millimeter ammunition. There were numerous books and manuals instructing in chemical reactions, physics, electronics, and assembly of circuit applications was found within the residence, as well as, large two-gallon bottles containing unknown chemical liquids. A worktable was located containing numerous wire clippings, tools and other items, as well as, miscellaneous electronic parts. Also located within the residence were bolt cutters, metal levers, and a set of telephone pole climbing spurs similar to those used by utility workers. Drug paraphernalia was located within the residence, including two glass pipes with burnt residue. Stolen property was located within the apartment, including the photograph album, prospectus, and blue prints identified as having been taken from the Hatt Building on June 1, 1998. Additionally, property from numerous commercial burglaries was located within the residence. Mark Knight was subsequently placed under arrest and booked into the Napa County Jail on three count of possession of stolen property (PC 496 - felony), two counts of possession of an explosive device

(PC 12303 - felony), felon in possession of ammunition (12316(b)(1) PC - felony), violation of probation (1203.1 PC - misdemeanor), possession of drug paraphernalia (11364 H&S -misdemeanor), and possession of material with intent to make explosives (12312 PC - felony).

20. A subsequent search warrant on the vehicle belonging to Steven Simoneau recovered flammable liquids, containers, labeled Pirodex black powder, plastic bulb containing an explosive black powder, black electrical tape, diagram of an electric device, shotgun shells, green colored fuse, cutting instruments, chains, locks indicating PG&E ownership, white pipe, pieces of wax, propane tanks with holes drilled in the side, and PG&E master keys. Charges were filed against Steven Simoneau for possession of a Molotov cocktail (1301(5) PC - felony), possession of a destructive device with the intent to destroy property (12303.3 PC - felony), transportation of a destruction device (12303.6 PC), possession of a material with the intent to manufacture explosives (12312 PC - felony), and transportation of explosives and hazardous material (31600 & 3200.5 VC - felony).

21. According to PG&E Investigator Bill Beeson, there have been no reported vandalism or arsons to PG&E sites or equipment since the arrest of Mark Knight and Steven Simoneau.

22. On March 23, 1999, I spoke to Special Agent Robert Shirley from the Bureau of Alcohol, Tobacco & Firearms. He informed me that the ammunition seized from Mark Knight's residence, to wit 173 rounds of M-60 machine gun ammunition, including 34 rounds of tracer ammunition, 34 rounds of .32 caliber ammunition,

and 38 rounds of nine millimeter ammunition, was all manufactured outside the State of California.

23. On March 23, 1999, I spoke to ATF Special Agent Robert Griego who informed me that that the Bureau of Alcohol, Tobacco & Firearms has no record that Steven Simoneau or Mark Knight registered any firearm, as defined in 26 U.S.C. § 5845(a) and (f).

24. On February 24, 1999, I retrieved copies of court documents showing that Mark Knight was convicted of the felony offense of sale and transportation of marijuana on October 4, 1990, and that Steven Simoneau was convicted of the felony offense of sale of cocaine on October 24, 1989.

_____
WILLIAM WHITE

Sworn and subscribed Before me

This 23 day of March 1999

__ILLEGIBLE_____
United Sates Magistrate Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. CR-99-0108-MJJ

UNITED STATES OF AMERICA,
PLAINTIFF

v.

MARK JAMES KNIGHTS AND STEPHEN SIMONEAU,
DEFENDANTS

DECLARATION OF TODD E. HANCOCK

I, Todd E. Hancock, declare and state that:

1. I am a Detective in the Napa County Sheriff Department where I have been employed for the past ten years.

2. Attached as *Exhibit A* is a copy of my report summarizing the probation search I conducted on June 3, 1998 at 538 Brown Street, Apartment 6 in Napa, California. Prior to searching this apartment, I was aware that Mark Knights (hereinafter Knights) was on probation for a felony narcotics conviction in Napa County, and that his residence was subject to search at any time, with or without a warrant, warrant of arrest or probable cause, by any probation officer or law enforcement officer. I did not contact the Probation Office prior to conducting the search because my training and experience is that I can lawfully conduct a probation search of a probationer's residence who is

subject to a search condition under California law without prior contact with or approval from the probationer's probation office/officer. Moreover, because Knights was on summary probation, there was no probation officer specifically assigned to Knights that I could contact. At the time I did the probation search of Knights' apartment, I believed there was probable cause to obtain a warrant to search Knights' apartment based upon my ongoing investigation of his criminal activities with Stephen Simoneau (hereafter Simoneau), including my surveillance observations as set forth in my report attached as *Exhibit B*. If I had not opted to conduct the probation search of the apartment, I would have written a search warrant for the apartment, as I did for Simoneau's pick-up truck. When I executed the probation search of the apartment, I was accompanied by local officers and there were no federal agents present nor had I consulted with any federal agents about the case or the search.

3. On June 16, 1998, I did a follow-up probation search of Knights' apartment. Attached as *Exhibit C* is my report of that search.

4. My reports that are attached as *Exhibits A, B,* and *C* are accurate to the best of my knowledge, except that I refer to Knights as "Knight" in these reports.

5. With respect to the towing and impounding of Simoneau's truck on June 3, 1998, I do not recall the exact time that I left the area of 5150 Wild Horse Valley Road. My best recollection is that I left that area at approximately 5:00 a.m. and went back to the Sheriff's Department preparatory to going to Knights' apartment for the probation search that morning.

6. When a vehicle is impounded the Sheriff's Department, it is standard procedure to inventory the contents of the vehicle.

7. With respect to the warrant that I obtained for Simoneau's truck, I believed the warrant was valid and I relied upon the warrant in searching the truck. Instead of applying for a search warrant for the truck, I believed that I could have lawfully searched the truck without a warrant after seeing a Molotov cocktail in plain view in the bed of the truck, and two PG&E/ PacBell type padlocks in plain view on the floor of the truck.

8(a). Attached as Exhibit 1 is a copy of the search warrant for Simoneau's truck, and my statement of probable cause for the issuance of the warrant. I did not intentionally omit from my statement of probable cause any information that I felt was material to the issuance of the warrant. In particular, I did not regard the area of the dirt road where Simoneau left his truck on the morning of June 3, 1998, to be part of the "curtilage" of the Wrights' residence that is further up the road.

8(b). On the last page of my statement of probable cause, I stated that an explosives expert from the California Department of Forestry was called and responded. This statement is true; the expert was Greg Smith who is a supervising investigator bomb technician. I also stated that numerous explosives and incendiary devices were recovered from the bed of the pick-up truck. This statement is also true. The items that I believed fit this description included a Molotov cocktail; two containers of black pyrodex (black powder); a bulb containing what appeared to be black

powder; and a brown glass jar containing unknown crystal material.

9. AUSA George Bevan has told me that Simoneau is arguing in his motion to suppress that items were seized from Simoneau's truck that were not included in the warrant. Items of jewelry were seized as potential evidence of theft. A shotgun shell was seized as evidence because Knights and Simoneau are convicted felons, prohibited from possessing ammunition. I had seen Knights in the truck on the morning of June 3, 1998. The wax, gray tape, red tape, red tank, green tank, corrosion tape, seal, and a come-along were seized as potential evidence of Knights' and Simoneau's criminal activities involving explosives and related conduct, including the PGE/PacBell vandalisms and arson.

10. On or about August 5, 1998, I participated in the search of a Ford station wagon that I was advised by Napa police had been involved in a hit-and-run accident while being driven by Simoneau, and that Simoneau had left the scene of the accident. I was further advised that the car was going to be towed and impounded by Napa police in connection with their investigation of the accident. I was called to the location of the car because of my ongoing investigation of Simoneau.

11. Attached as *Exhibit E* is a copy of a parcel map from the Napa County Assessor's office which I have been advised by Napa Police Detective Joe Matulich, depicts the dirt road that begins on Wild Horse Valley Road and winds to the right to the Wrights' residence. I have circled the approximate location on the road where Simoneau left his truck in the early morning of

June 3, 1998. Simoneau's truck was visible from Wild Horse Valley Road, a public street.

I declare under penalty of perjury that the foregoing statements are true to the best of my recollection.

Executed this 4 day of July, 1999, in Napa, California.

TODD E. HANCOCK

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA (SAN FRANCISCO)

No. 99-CR-108-ALL

UNITED STATES OF AMERICA, PLAINTIFF

v.

MARK JAMES KNIGHTS; STEVEN SIMONEAU, DEFENDANTS

TRANSCRIPT

[August 18, 1999]

* * * * *

[176]

Q. OKAY. AND DID YOU CONFIRM WHETHER OR NOT HE WAS ON SUMMARY OR FORMAL PROBATION?

A. I CONFIRMED THAT HE WAS ON SUMMARY PROBATION.

Q. AND DO YOU HAVE AN UNDERSTANDING, SIR, AS TO WHETHER IF YOU'RE ON SUMMARY PROBATION, THERE'S A PROBATION OFFICER ACTUALLY ASSIGNED TO THE PERSON?

A. IT'S MY UNDERSTANDING THAT THERE IS NOT.

Q. DID YOU EXECUTE THE PROBATION SEARCH TO GET AROUND THE WARRANT REQUIREMENT?

MS. FOX: OBJECTION, YOUR HONOR, LEADING.

THE COURT: I'LL SUSTAIN THE OBJECTION. YOU CAN ASK IT AGAIN.

BY MR. BEVAN:

Q. WHY DID YOU DO A PROBATION SEARCH RATHER THAN OBTAINING A WARRANT?

A. I BELIEVE THAT THERE WAS SIGNIFICANT EXIGENCY IN CONDUCTING A SEARCH OF MR. KNIGHTS' APARTMENT AS SOON AS POSSIBLE. I KNEW THAT HE WAS ON PROBATION WITH A SEARCH-AND-SEIZURE CLAUSE AND UTILIZED THAT TO CONDUCT THE PROBATION [177] SEARCH IN AN EXPEDIENT MANNER.

Q. OKAY. AND AT WHAT POINT—OR HAD YOU DONE ANY PREPARATION FOR THE PROBATION SEARCH PRIOR TO DOING A SURVEILLANCE THAT MORNING?

A. THE PREVIOUS DAY.

Q. AND WHAT HAD YOU DONE BY WAY OF PREPARING TO DO A PROBATION [177] SEARCH?

A. PREPARED AN OPERATION ORDER AND OBTAINED THE PERMISSION OF MY DIRECT SUPERVISOR TO UTILIZE PERSONNEL TO ASSIST.

Q. OKAY. SIR, IF MY KNIGHTS HAD NOT BEEN ON PROBATION, WOULD YOU HAVE DONE ANY-

THING DIFFERENT WITH RESPECT TO YOUR INVESTIGATION?

A. YES.

Q. WHAT WOULD THAT HAVE BEEN?

A. I WOULD HAVE OBTAINED OR ATTEMPTED TO OBTAIN A SEARCH WARRANT TO ALLOW US TO ENTER AND SEARCH HIS APARTMENT.

Q. AND WITH RESPECT TO THE OBTAINING A SEARCH WARRANT FOR THE TRUCK, HAD YOU RECEIVED TRAINING AT SOME POINT AS TO WHETHER OR NOT A WARRANT WAS REQUIRED TO SEARCH A VEHICLE WHERE CONTRABAND WAS FOUND?

A. YES.

Q. AND DID YOU HAVE ANY KNOWLEDGE AS TO WHETHER A WARRANT WAS OR WAS NOT REQUIRED TO SEARCH A VEHICLE?

A. IT'S MY UNDERSTANDING THAT A WARRANT WAS NOT NECESSARY.

Q. OKAY. AND SO WHY DID YOU GET A WARRANT FOR THE TRUCK?

A. BECAUSE I WANTED TO BE THOROUGH AND COMPLETE AND BEING ABOVE THE LAW ON THIS.

Q. WELL, YOU SAY "ABOVE THE LAW." YOU MEAN—

A. I HESITATED USING THAT WORD, BECAUSE I'M TRYING TO THINK OF A CORRECT

PHRASEOLOGY. BUT TO MAKE SURE THAT EVERYTHING WAS ACCURATE AND AS LEGAL AS POSSIBLE TO SEARCH THE VEHICLE.

[183]

* * * * *

MR. KNIGHTS WAS STILL ON FELONY PROBATION AT THE TIME WITH SEARCH AND SEIZURE AS A CONDITION OF THAT PROBATION, AND WE WENT BACK IN WITH THE AUTHORITY OF THAT PROBATION ORDER.

Q. OKAY. NOW, YOU HAD MENTIONED—JUST TO GO BACK FOR A MOMENT ON THE JUNE 3RD PROBATION SEARCH. AND YOU INDICATED, SIR, THAT YOU HAD EXIGENT CIRCUMSTANCES, AT LEAST YOU THOUGHT ABOUT THAT; IS THAT CORRECT?

A. YES, SIR.

Q. NOW, I BELIEVE YOU MENTIONED THAT YOU HAD ACTUALLY HAD STATIONED A DEPUTY AT MR. KNIGHTS' APARTMENT; IS THAT TRUE?

A. YES.

Q. SO WOULDN'T IT BE A FAIR STATEMENT TO SAY THAT ANOTHER OPTION COULD HAVE BEEN TO HAVE SOMEONE SECURE THE RESIDENCE AND OBTAIN A WARRANT? ISN'T THAT TRUE?

A. YES.

Q. YOU'VE DONE THAT IN OTHER SITUATIONS?

A. YES.

Q. OKAY. AND SO THE DEPUTY WAS STATIONED THERE IN THE VICINITY OF THE APARTMENT; IS THAT CORRECT?

A. YES.

Q. WITH RESPECT TO THE AUGUST 5TH SEARCH OF THE FORD WAGON, DID YOU REMOVE ANY ITEMS FROM THE STATION WAGON?

A. YES, SIR.

Q. WHAT DID YOU REMOVE, SIR?

A. A HANDWRITTEN LETTER.

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* * * * *

EXACTLY DOES THAT MEAN? WHAT DID YOU DO?

A. I ASKED DETECTIVE GENE DONALDSON TO RESPOND TO 538 BROWN STREET AND MAINTAIN OBSERVATION OF THE APARTMENT.

Q. DID YOU DO ANYTHING ELSE WITH RELATION TO SURVEILLANCE?

A. NO.

Q. THEN YOU ALSO TESTIFIED THAT YOU BEGAN TO GET TOGETHER THE PERSONNEL AND THE ITEMS IN ORDER TO CONDUCT THE SEARCH?

A. YES.

Q. AND WHAT DID THAT INVOLVE? WHAT DOES THAT MEAN THAT YOU DID?

A. BEING BETWEEN 5:00 AND 8:00 IN THE MORNING, THERE WERE NO OTHER PERSONNEL WORKING AT THE TIME, SO I HAD TO WAKE PEOPLE UP AND GET THEM TO THE OFFICE FOR A BRIEFING AND TO BRIEF THEM ON THE SITUATION, WHAT THE MISSION WAS AND TO GATHER THE APPROPRIATE MATERIAL TO DO THE SEARCH.

Q. WAS IT DURING THAT TIME THAT YOU ALSO PREPARED THE—DID YOU DO ANY PREPARATION TO THE OPERATION ORDER AT THAT TIME?

A. NO, MA'AM.

Q. THAT WAS PREPARED THE DAY BEFORE?

A. YES, MA'AM.

Q. DETECTIVE, WITH REGARD TO THE ISSUE OF MR. KNIGHTS BEING ON PROBATION, HOW DID YOU LEARN THAT MR. KNIGHTS WAS ON PROBATION?

A. THE PROBATION RECORDS ARE KEPT AT THE SHERIFF'S DEPARTMENT ACROSS THE HALL FROM MY OFFICE. I WENT OVER THERE, DID A SEARCH OF MR. KNIGHTS' NAME, RETRIEVED HIS PERSONAL [219] IDENTIFICATION NUMBER, AND VIEWED THE ASSOCIATED FILE, AND VIEWED THE MOST CURRENT PAPERWORK ASSOCIATED WITH HIS PROBATION STATUS.

Q. BEFORE YOU WENT OVER THERE, DID YOU HAVE ANY IDEA ABOUT WHETHER HE WAS OR WAS NOT ON PROBATION?

A. I DON'T RECALL.

Q. HAD YOU BEEN IN CONTACT WITH THE DISTRICT ATTORNEY'S OFFICE AT ALL ABOUT ANY CRIMINAL ACTIONS AGAINST MR. KNIGHTS?

A. NO.

Q. AND WHEN YOU REVIEWED THE FILE, DO YOU REMEMBER WHAT, IN FACT, HE WAS ON PROBATION FOR?

A. I BELIEVE IT WAS A NARCOTICS VIOLATION.

Q. AND THIS FILE, JUST TO BE CLEAR, IS IT THE PROBATION OFFICE'S FILE OR WHOSE FILE IS IT THAT YOU REVIEWED?

A. IT IS THE SHERIFF'S DEPARTMENT'S FILE WITH COURT PAPERWORK FOR ANY COURT PROCEEDINGS THAT OCCUR IN NAPA COUNTY RELATING TO PROBATION. THIS ENABLES OUR RECORDS CLERKS TO DO PROBATION CHECKS ON PEOPLE AFTER HOURS. IF ONE OF THE DEPUTIES STOPS SOMEBODY ON THE ROAD AND CALLS IN, THEY CAN CHECK PROBATION STATUS THAT WAY.

Q. OR AS IN THIS CASE, IF YOU'D LIKE TO CONDUCT A SEARCH WITHOUT A WARRANT, YOU CAN GO AND DETERMINE WHETHER OR NOT SOMEBODY IS ON PROBATION SUBJECT TO A SEARCH CONDITION; CORRECT?

A. YES.

* * * * *

[223]

A. THE LANDLORD OF 538 BROWN STREET?

Q. YES.

A. YES, MA'AM.

Q. AND DID YOU HAVE CONVERSATIONS WITH HIM TO DETERMINE OR REGARDING MR. KNIGHTS' RESIDENCE AND WHERE HE RESIDED?

A. YES.

Q. AND BASED ON YOUR CONVERSATIONS WITH HIM, WERE YOU ABLE TO ASCERTAIN THAT MR. KNIGHTS DID HAVE A LEASE TO RENT AN APARTMENT ON BROWN STREET?

A. I DON'T THINK I TALKED WITH HIM ABOUT THAT. I ASKED HIM IF HE RESIDED THERE OR RENTED THERE, AND HE TOLD ME HE DID.

Q. AND WERE YOU ABLE TO ASCERTAIN THAT MR. KNIGHTS WAS THE SOLE OCCUPANT OF THAT—SOLE OFFICIAL OCCUPANT OF THAT APARTMENT?

A. YES.

Q. AND THAT'S WHY YOU SWORE OUT IN THE SEARCH WARRANT AFFIDAVIT THAT IT WAS SOLELY OCCUPIED BY MR. KNIGHTS?

A. YES.

Q. ON THE TIME OF THE FIRST SEARCH, THE JUNE 3RD SEARCH OF BROWN STREET, YOU AND THE OTHER OFFICERS HAD TO BREAK INTO THE BOTTOM DOOR; IS THAT CORRECT?

A. YES.

Q. AND THAT'S THE OUTSIDE DOOR ON THE WESTERN SIDE OF THE BUILDING?

A. IT'S A SHARED DOOR FOR THE ENTIRE COMPLEX.

[224]

Q. AND HOW DID YOU GET THROUGH THE LOCKS ON THAT DOOR?

A. I DON'T RECALL IF ONE OF THE OTHER OFFICERS KICKED THE DOOR OR IF HE USED A RAM.

Q. BUT THAT DOOR WAS SOMEHOW BROKEN DOWN?

A. YES, MA'AM.

Q. WHEN YOU GOT UP TO THE SECOND DOOR ON THAT FIRST SEARCH, YOU DIDN'T NEED TO BREAK IT DOWN; IS THAT CORRECT?

A. NO, MA'AM.

Q. WAS THE DOOR UNLOCKED?

A. YES.

Q. AND THEN YOU CAME BACK AGAIN IN JUNE, LATER ON JUNE 16TH?

A. YES.

Q. AT THAT TIME DID YOU AGAIN BREAK DOWN THE BOTTOM DOOR?

A. NO.

Q. HOW DID YOU GET IN THAT TIME?

A. MR.—I DON'T RECALL IF MR. GOMEZ WAS THERE AT THAT POINT. I BELIEVE THAT HE WAS BUT SOMEONE WAS THERE THAT HAD THAT DOOR OPEN.

Q. I'M SORRY. THAT WASN'T CLEAR. SOMEONE WAS THERE WHO OPENED THE DOOR FOR YOU?

A. THE DOOR WAS OPEN WHEN WE ARRIVED.

Q. THE DOOR HAD ALREADY BEEN OPENED?

A. YES, MA'AM.

Q. SO YOU WERE ABLE TO GET IN THAT WAY?

A. YES, MA'AM.

NAPA COUNTY SHERIFF'S DEPARTMENT
INVESTIGATIONS BUREAU
1125 THIRD STREET, NAPA, CA 94559

Case: 98-1692

NAT CODE: PAGE 1 OF 3

06-02-98 INCIDENT/CRIME CLASSIFICATION
451, 459 P.C.

REPORT AREA

TIME LOCATION OF OCCURRENCE:
Gateway Road West & Devlin Road

CODE:
Suspects

NAME, LAST, FIRST, MIDDLE (FIRM OF BUSINESS):
Mark J. Knight and Stephen A. Simoneau

SURVEILLANCE/RECOVERY OF SUSPECT VEHICLE

On June 3, 1998, at 2400 hrs., based upon investigation, a possible suspect in this arson case was identified as Mark Knight, further described as

MARK J. KNIGHT
DOB 11-28-64
6-9, 280, Brn-Hzl
538 Brown Street, #6, Napa

Previous investigation indicated that Knight was a suspect in prior vandalisms and arsons in Pacific Gas & Electric, based on Knight's long-standing grudge

against PG & E stemming from a prior theft of services complaint made against Mark Knight by PG & E investigations.

I discovered that Mark Knight had recently been placed on summary probation for 11550 H&S, with search and seizure ordered as a condition of that probation. I learned that Mark Knight lives at 538 Brown Street, Apartment #6, within the City of Napa. I also learned that on a prior occasion Knight had been seen in the company of a subject identified as Stephen Simoneau, further described as:

STEPHEN ANDREW SIMONEAU
DOB 01-31-64
5-11, 165, Brn-Gra
Transient

On 05-24-98 at 2201 hrs., Mark Knight was seated in the passenger seat of Simoneau's 1990 red Toyota pick-up truck (CAL Lic 4C53487), was contacted by Dep. M. Hunter. Knight and Simoneau, who was driving, were observed parked near a main PG & E gas line which was located at Hwy. 29 and Zinfandel Lane. When questioned they had no reasonable explanation as to their presence at that location. At the time, Dep. Hunter noted that the vehicle contained numerous chains and tools, along with cans of gasoline.

In conducting an internal records check, it was discovered that incidents of vandalism and arson against Pacific Gas & Electric facilities had occurred within two or three days of Mark Knight's court appearance dates associated with the PG & E theft of services case. Most recently, on 05-29-98, Mark Knight appeared in Napa County Municipal Court and was

sentenced to 90 days in jail with a remand date of 07-03-98.

Based upon the above information and the concurrence of the Devlin Road arson fire to Knight's most recent court appearance date, a surveillance was authorized and initiated for Knight's residence at 538 Brown Street, Apartment #6.

On 06-03-98 at approximately 0005 hrs., I initiated surveillance that on the residence of Mark James Knight. I observed that the apartment belonging to Mark Knight was dark and the vehicle associated with Knight (the 1990 red Toyota pick-up truck) was not present. At approximately 0145 hrs, I observed that vehicle approach the residence and park along the Riverside aspect to the apartment building.

I observed a suspect who I recognized as Stephen Simoneau exit the driver's door of that Toyota truck and a subject I recognized as Mark Knight exit the passenger door. Simoneau remained next to the driver's door while Knight removed two items that I recognized as being house doors from the bed of the pick-up truck and place them along the side of the apartment building. He then took a box containing unknown items and also placed them along the side of the building.

Knight and Simoneau walked around the front of the building and entered the southern-most door on the Brown Street side, which had previously been identified to me as the door leading to Knight's apartment. I noted that, upon the suspects entering the door, the lights for the apartment on the southern-most (River-

side) street aspect were turned on. These lights remained on until approximately 0310 hrs.

At that time I observed suspect Simoneau exit the building and approach his vehicle. I observed Simoneau carrying three cylinder-shaped items, approximately 3 ft. in length, cradled in his arms. I observed Simoneau approach his vehicle and put into the bed of the vehicle an object resembling a jar. Simoneau then walked across Riverside Street toward the Napa River, briefly exiting my line of sight. From my position, approximately 50 yds. away, I distinctly heard the sound of three (3) splashes coming from the area next to the river where Simoneau was.

After approximately 20 seconds Simoneau re-entered my line of sight and I observed that he was no longer carrying anything. I believe that suspect Simoneau threw into the Napa River the objects he had been carrying in his arms. Simoneau re-approached his red Toyota pick-up truck and removed from the bed of that truck what appeared to be a glass jar; he then produced a white towel or tee shirt from the truck-bed and wiped the exterior of the jar before replacing both items in the bed of the truck. I observed Simoneau then unload the driver's door, enter and start the vehicle.

Simoneau made a U-turn and proceeded north on Riverside to Brown Street. I followed Simoneau as he passed by the Sheriff's Department on Main Street and turned right onto Third Street. I continued to follow Simoneau as he drove down Third Street onto Coombsville Road and out into the unincorporated Napa County area. I observed suspect Simoneau turn left into a driveway marked at 5150 Wild Horse Valley Road. I knew from previous discussions with Napa

Police Department Officer D. Peecook that Simoneau is known to do work at that Wild Horse Valley Road address.

I waited approximately 20 minutes for suspect Simoneau to exit the driveway. When, after 20 minutes had elapsed and Simoneau had not left, I notified patrol officers from the Napa County Sheriff's Department who responded and located the vehicle belonging to Simoneau parked and unoccupied approximately 40 yds. north of Wild Horse Valley Road on the driveway associated with 5150. Because we believed that Simoneau may be attempting to commit a crime in the area, we conducted a sweep of the surrounding area for suspect Simoneau, with negative results.

Within the bed of the truck, near the front of the bed, I observed a clear glass jar containing a cloudy liquid substance, noted that a white cloth was inserted into this liquid and protruded from the top of the bottle. I recognized the device as incendiary explosive device commonly referred to as a Molotov cocktail. In plain view on the floor of the truck cab (on the passenger's side) I observed two brass padlocks which appeared similar to the type described by PacBell and PG & E representatives as having been used to secure the utility boxes involved in the arson incident on Devlin Road.

I immediately secured the area and contacted Napa Sheriff's Department Det. Sgt. E. Lyeria, who authorized the call-out of Sgt. J. Robertson and Dep. C. Perry (hazardous device technicians with the Napa County Sheriff's Department) to respond to that location. In addition, CDF investigator Capt. D. Edelman responded, along with CDF personnel for the safe

removal and storage of the materials. (For further information regarding the items seized from the bed of the pick-up truck, refer to the supplemental reports prepared by Det. J. Steiner and Sgt. J. Robertson.)

Det. Steiner seized and impounded the vehicle under §22655.5(b) CVC, and the vehicle was towed to the Napa County Sheriff's caged lot pending issuance of a Search Warrant.

RECOMMENDATION

Case status: Pending issuance of Search Warrant for vehicle.

NAPA COUNTY SHERIFF'S DEPARTMENT
INVESTIGATIONS BUREAU
1125 THIRD STREET, NAPA, CA 94559

Case: 98-1692

NAT CODE: PAGE 1 OF 1

INCIDENT/CRIME CLASSIFICATION

REPORT AREA

TIME LOCATION OF OCCURRENCE:
538 Brown Street, Apt. #6, Napa

CODE:
Suspect

NAME, LAST, FIRST, MIDDLE (FIRM OF BUSINESS):
Mark James Knight

ANCILLARY PROBATION SEARCH

On June 16, 1998, at 1600 hrs., Det. J. Donaldson and I responded to 538 Brown Street, Apt. #6, the residence of Mark Knight in order to conduct a follow-up probation search of that residence for items of potential evidence that may have been overlooked or unknown to us on the day of original probation search.

When we arrived at the residence we contacted a female identified as Mark Knight's girlfriend, Kathy Brown, inside the apartment. Ms. Brown was in the process of packing items belonging to Mark Knight, who had been advised that he was no longer welcome at the Brown Street address.

We advised Brown of the purpose of our return and she allowed us entry, stating that she knew Mark was still in custody. Brown said she had spoken with him recently and he identified two (2) items that she said he had told her did not belong to him and that he no longer wished to possess them. These items were identified as an overhead photographic blueprint of the Hatt Building (and the Napa River adjacent to it), and a white photographic envelope containing numerous pictures that I (visually) identified as being of the Napa River adjacent to the Hatt Building and of a paddle-wheel boat that I (visually) identified as the former 'Petaluma Queen'(now known as 'Grand Romance').

In addition to the above items, two (2) pairs of shoes, identified by Brown as belonging to Mark Knight, and a 1-gallon metal can containing acetone were removed from the residence.

All of the above items were confiscated and booked into evidence at the Napa County Sheriff's Department. The blueprint and photographs were subsequently identified by employees of the Hatt Market as having been stolen in prior burglary. (For further information, refer to Det. P. Valente's supplemental report). The shoes were booked into evidence with a request for comparison to shoe prints recovered from a commercial burglary (see NSO Case #98-1177).

RECOMMENDATION

Case closed by arrest. Refer copy of report to B. Tong of the District Attorney for evaluation and charges of §496 P.C. against suspect Mark Knight.

STATEMENT OF PROBABLE CAUSE

Your Affiant, Detective Todd Hancock, has been involved in law enforcement since 1983, initially as a law enforcement officer with the United States Air Force and since 1989 with the Napa County Sheriff's Department. Your Affiant has attended the Santa Rosa Police Academy and received formal instruction in specific investigative procedures and techniques and is a graduate of the Robert Pressley Institute of Criminal Investigations. Your Affiant's assignments have included Patrol, Boat Patrol, S.W.A.T., DARE, and is currently a Field Training Officer.

Your Affiant's current assignment is with the Property Section in the Investigations Division. Your Affiant has investigated hundreds of burglaries and thefts, including residential, commercial and vehicle. Your Affiant has arrested numerous persons for grand thefts and burglaries, petty theft and other property crimes. Your Affiant has located and recovered property taken in numerous burglaries. Your Affiant has received formal training from experienced investigations in the Investigations and Patrol Divisions at the Napa County Sheriff's Department and the United States Air Force.

Your Affiant has interviewed many admitted burglars and thieves and has questioned them regarding the manner in which they commit crimes, transport and dispose of stolen property. Your Affiant is very familiar with the crimes burglary and theft, and the ways they are committed in the County of Napa. Your Affiant has investigated numerous crimes against persons, including battery, assault with a deadly weapon, rape

and robbery, and has arrested persons for the above-listed crimes.

Your Affiant has formal training and experience in the preservation of crime scenes and the collection of evidence, as well as assisting in search and arrest warrants of various premises and persons. Your Affiant has received formal training at the Santa Rosa Police Academy regarding the investigation of rape, sexual assault and child abuse, and other related offenses, and informal training on the above at the Napa County Sheriff's Department Patrol Division, and has investigated several sexual crime cases. Your Affiant has received specialized training in the investigation and forensic examination of computers and high technology crime, and is familiar with computer crime and how computers and data storage devices are used in the commission of crimes and the documentation of criminal activity.

Your Affiant is involved in a long-standing investigation involving the vandalism of and arson of Pacific Gas & Electric facilities dating back to 1996, and includes dozens of reported incidents.

For example, numerous incidents have taken place in which sections of chain (or rebar) were thrown onto transformers, causing short-circuits and eliminating power for thousands of subscribers throughout Napa County. Switches at various gas locations have been damaged and chains to fenced facilities have been cut. Beginning in December of 1997, in a series of five (5) incidents, guy wires on power poles were intentionally sawed through or cut with bolt cutters.

The most recent incident occurred in the early morning hours of June 1, 1998. A power transformer located on Devlin Road and servicing the Napa County Airport facilities was pried open and an adjacent Pacific Bell truck line controlled environment vault (CEV) was also pried open. An incendiary device was utilized to ignite a fire within the Pacific Bell controlled environment vault, causing approximately 1.5 million dollars ($1,500,000) in damage and eliminating telephone service for thousands of customers throughout the airport and industrial complex.

Your Affiant has learned from the California Department of Forestry arson investigators that a flammable liquid, possibly a gasoline mixture was utilized in the arson at the Pacific Bell CEV on Devlin Road. Your Affiant knows that several brass padlocks were pried from the Pacific Gas & Electric box and the Pacific Bell box prior to the arson and were not located on the scene.

During the investigation of the various P G & E vandalisms, Your Affiant has developed information indicating that on numerous occasions the vandalisms and arson events have occurred within one or two days of scheduled Court appearance dates of a subject known to Your Affiant and identified as Mark James Knight. Your Affiant knows that on Friday, May 29, 1998, Mark Knight had a Court appearance date, at which he was informed that he be required to turn himself in for a 90 day remand, as of July 3, 1998.

Your Affiant knows that Mark Knight has been arrested for theft of P G & E services and is also known to have been in possession of explosives and bomb-manufacturing materials.

Your Affiant knows that Mark Knight is a friend and frequent associate of a subject known to Your Affiant and identified as Stephen Andrew Simoneau and that on May 24, 1998, Mark Knight and Stephen Simoneau were stopped near a main Pacific Gas & Electric gas line by an on-duty Napa County Sheriff's Deputy and had no reasonable explanation for their presence in that area.

Your Affiant knows that, during the field interview, numerous pipes and chains were observed within the bed of the pick-up truck, further identified as a 1990 Toyota pick-up truck, California license 4C53487, registered to Steve Simoneau.

Your Affiant knows that Mark James Knight is currently on summary probation for Health & Safety Code violations and is required to submit to search of his person, property, place of residence, and vehicle, with or without a Search Warrant or reasonable cause at any time of day.

Your Affiant also knows that Mark Knight lives at 538 Brown Street, Apartment #6, in the City of Napa. Your Affiant knows that Stephen Simoneau is a frequent visitor at that address and spends extensive periods of time in Mark Knight's apartment in Knight's company and that the vehicle owned and driven by Stephen Simoneau is frequently seen parked adjacent to the multi-plex.

On June 2, 1998, a surveillance on 538 Brown Street was established. At approximately 0145 hrs. on June 3, 1998, Your Affiant observed the red Toyota pick-up truck owned by Stephen Simoneau pull up to the apartment complex. Your Affiant observed a subject

that I recognized as Stephen Simoneau exit the driver' seat and a subject I recognized as Mark Knight exit the passenger's seat. Both subjects removed various items of property from the bed of the pick-up truck and entered the doorway leading to Apartment #6 where they remained for a period of time.

At approximately 0310 hrs. Your Affiant observed Simoneau leave the apartment complex and approach his vehicle with numerous objects carried in his arms. These objects appeared to be cylindrical, approximately three (3) feet in length and wrapped in a covering. Your Affiant observed Simoneau approach the bed of his truck, remove a smaller jar-shaped object and place it within the bed of his truck. Your Affiant then observed Simoneau approach the riverbank located directly across the street from the apartment complex and leave Your Affiant's line of sight for approximately 20 seconds. Your Affiant heard three (3) distinct 'splash' sounds during the time that Simoneau was out of Your Affiant's sight.

Your Affiant then observed Simoneau re-enter my line of sight, walking toward his vehicle with nothing in his arms. Your Affiant then observed Simoneau remove an object described as a glass jar and wipe it with a white towel or tee shirt. Your Affiant then observed Simoneau replace the object in the rear of the pick-up truck and throw the towel or tee shirt into the bed of the pick-up truck.

Your Affiant observed Simoneau enter the driver's side of the pick-up and start the truck. Your Affiant then followed Simoneau out of the city limits of Napa on Coombsville Road and observed Simoneau turn onto a driveway located at 5150 Wild Horse Valley Road.

Your Affiant requested patrol response and Simoneau's vehicle was subsequently located approximately 40 yards north of the driveway, parked in the middle of the driveway. Your Affiant observed that the vehicle's lights were off, the doors were locked and there was no one in or near the vehicle. A subsequent search of the area could not locate Simoneau.

Your Affiant was informed by responding deputies that residents nearby were contacted and questioned regarding Simoneau's presence. Your Affiant learned that Simoneau was known in the area for doing "odd jobs" and, at times, spent the night in the cab of his pick-up truck nearby.

Your Affiant observed within plain sight in the rear of the pick-up truck an item that Your Affiant identified by sight as consistent with a gasoline incendiary device, commonly known a 'Molotov Cocktail'. Your Affiant observed the noticeable smell of gasoline emanating from the clear bottle which contained a cloudy liquid and a piece of white cloth dipped into the liquid and protruding from the top of the bottle.

Also in plain view in the bed of the pick-up truck Your Affiant observed chains similar to those used to destroy Pacific Gas & electric transformers, a chain pole device with what appeared to be blue paint transferred onto the hook and other devices, unidentifiable by Your Affiant.

An additional gas can and padlocks were observed in the bed of the pick-up truck. In plain view on the floorboard on the passenger's side were two brass padlocks that appeared to have recently been damaged. These padlocks appeared to be of the type described as

having been removed from the P G & E and Pacific Bell boxes located on Devlin Road.

Your Affiant knows that an explosives expert from the California Department of Forestry was called and responded, recovering numerous explosives and incendiary devices from the bed of the pick-up truck.

Your Affiant conducted a probation search of Mark Knight's residence, located at 538 Brown Street, Apartment #6, in Napa, at 0800 hrs. on June 3, 1998. Your Affiant located numerous items of drug paraphernalia in addition to the above items utilized in the manufacture of destructive devices, to wit, detonation cord, tracer ammunition, machine gun ammunition, chemicals and instruction manuals for the manufacture of destruction devices were located within the residence. Your Affiant also located within the dwelling, identified as being solely occupied by Mark Knight, a brass padlock engraved with the letters "P G & E".

Based upon the above described evidence, Your Affiant believes that additional evidence of explosives manufacturing and evidence of the aforementioned crimes of arson and vandalism will be located within the vehicle. Your Affiant knows that the vehicle was impounded and removed to the Napa County Sheriff's Department locked cage.

Your Affiant therefore respectfully requests that a Search Warrant be issued.

PROBATION ORDER

MUNICIPAL COURT FOR
THE COUNTY OF NAPA
STATE OF CALIFORNIA

NMC NO. CR33859

8702516-02

PROB. NO. _____

THE PEOPLE OF THE STATE OF CALIFORNIA
VS

Mark James Knights

DEFENDANT

☑ SUMMARY PROBATION

☐ FORMAL PROBATION

DOB 11/28/64

VIOLATION DATE 1/15/98

THE ABOVE NAMED DEFENDANT HAVING BEEN CONVICTED OF A MISDEMEANOR VIOLATION OF

SECTION 11550(a) H&S IS HEREBY ORDERED: (APPLICABLE ITEMS CHECKED)

TERM OF PROBATION:

☑ Imposition of sentence is suspended and the defendant is granted probation for 3 year(s) ☑ summary ☐ formal. If formal probation is granted, it is ordered that defendant report to the Probation Department. Obey all the directives of the Probation Officer and report as directed.

☐ Probation modified/reinstated. Original terms and conditions in full force and effect except as amended herein this date.

CONDITIONS OF PROBATION: 8:00 AM. - C

1. ☑ Be confined to the custody of the Department of Corrections.
   - ☑ For 90 days commencing August 3, 1998.
   - ☐ _____ days may be served on the County Work Program with consent of the Director of Corrections. Call Community Justice Program for appointment within 5 days (see (1) on reverse)
   - ☐ For _____ weekends commencing _____ AM/PM
   - ☐ Time in custody (consecutive) (concurrent) to _____
   - ☐ Report to Department of Corrections immediately to arrange surrender date.
2. ☐ Pay a fine of $_____ includes penalty assessments or $_____ with proof of _____.
   - ☐ To Central Collections (see (11) on reverse)
   - ☐ Fine to be paid from Bail:

   Bail ☐ Exonerated.
   - ☐ Forfeiture set aside.
   - ☐ Other _____
3. ☑ Make restitution in the sum of $ 100= Victim Fund
   - ☐ Payable through Central Collections (see (11) on reverso) by 6/1/98
   - ☐ Payable in amount and manner prescribed by the Probation Department. at Front Counter
4. ☑ Violate no same or similar laws.
5. ☑ Obey all laws.
6. ☐ Commence and continue education, psychology, psychiatric, alcohol counseling or other rehabilitation program as prescribed by the Probation Officer and not leave or terminate contact with any such program without his/her permission.
7. ☐ Totally abstain from the use of alcohol.
8. ☑ Submit to drug, narcotic or alcohol use detection test as directed by probation officer or any peace officer.
9. ☑ Submit his/her person, property, place of residence, vehicle, personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer.
10. ☐ Not drive a motor vehicle unless properly licensed by State of California to do so.
11. ☐ Maintain minimum vehicular insurance as required by state law.
12. ☑ Other conditions: _____

UPON SATISFACTORY COMPLETION OF PROBATION YOU MAY APPLY TO THE COURT TO HAVE YOUR CONVICTION SET ASIDE PURSUANT TO SECTION 1203.4 OF THE PENAL CODE. I HAVE RECEIVED A COPY, READ AND UNDERSTAND THE ABOVE TERMS AND CONDITIONS OF PROBATION AND AGREE TO ABIDE BY SAME.

X _____
RECEIPT OF COPY ACKNOWLEDGED/DEF. SIGNATURE

2518119
TELEPHONE

A 538 Brown St Apt 6
HOME ADDRESS/CITY/STATE

C3543430 567-92-3121
D.L. NO. SOCIAL SECURITY NO.

I CERTIFY THE FOREGOING IS A TRUE COPY OF THE JUDGMENT RENDERED ON THE ABOVE DATE BY THE NAMED JUDGE.

JANICE F. NORTON
COURT EXECUTIVE OFFICER

BY _____, DEPUTY

_____ 5/29/98
JUDGE DATE

DISTRIBUTION: DEF DA PROB CORR COM. JUS. PRG. ARR. AGENCY NSO OTHER JR

SM 3/92 PROBATION ORDER

BEST AVAILABLE COPY

Supreme Court, U.S.
FILED
JUL
12 2001
OFFICE OF THE CLERK

No. 00-1260

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MARK JAMES KNIGHTS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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Solicitor General
Counsel of Record

MICHAEL CHERTOFF
Assistant Attorney General

MICHAEL R. DREEBEN
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MALCOLM L. STEWART
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Washington, D.C. 20530-0001
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QUESTION PRESENTED

Whether respondent's agreement to a term of probation that authorized any law enforcement officer to search his person or premises with or without a warrant, and with or without individualized suspicion of wrongdoing, constituted a valid consent to a search by a law enforcement officer investigating crimes.

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In the Supreme Court of the United States

No. 00-1260

UNITED STATES OF AMERICA, PETITIONER

v.

MARK JAMES KNIGHTS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 219 F.3d 1138.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 2000. A petition for rehearing was denied on October 5, 2000 (Pet. App. 39a). On December 26, 2000, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including February 2, 2001. The petition for certiorari was filed on February 2, 2001, and was granted on May 14, 2001. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

1. On May 29, 1998, respondent Mark James Knights was placed on three years' summary probation for a violation of California Health and Safety Code § 11550(a) (West 1991).[1] Section 11550(a) makes it a misdemeanor for any person to use, or be under the influence of, specified controlled substances. Summary probation in California does not involve direct supervision by a probation officer. Pet. App. 4a. Among the terms stated on the probation order form was that respondent would "[s]ubmit his * * * person, property, place of residence, vehicle, [and] personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer." J.A. 50; Pet. App. 4a. Respondent signed the form, which stated (immediately above respondent's signature): "I HAVE RECEIVED A COPY, READ AND UNDERSTAND THE ABOVE TERMS AND CONDITIONS OF PROBATION AND AGREE TO ABIDE BY SAME." J.A. 50.

[1] See J.A. 36-37, 50. On that same date, respondent was sentenced to 90 days in jail, to commence on August 3, 1998. J.A. 50. Thus, respondent was sentenced to a term of probation of slightly more than two months, to be followed by a jail term of 90 days, to be followed by an additional period of probation. The events that gave rise to the present controversy occurred within the first week of respondent's initial probation period.

Three days after respondent was placed on probation, a Pacific Gas & Electric (PG&E) power transformer and adjacent Pacific Bell telecommunications vault near the Napa County Airport were pried open and set on fire with an incendiary device using a gasoline accelerant, causing an estimated $1.5 million in damage. Pet. App. 2a-3a; J.A. 45. Respondent had been suspected of prior acts of vandalism against PG&E property, based on his longstanding grudge against the company stemming from a theft-of-services complaint made against him by PG&E investigators and a prior discontinuation of respondent's electrical services for failure to pay his bill. He therefore immediately became a suspect in this case. J.A. 11-12, 35-36; Pet. App. 2a. On June 3, 1998, after the sheriff's office had made a variety of observations that suggested that respondent might be involved in the vandalism,[2] a sheriff's detective searched respondent's apartment, relying on the consent-to-search condition of respondent's probation order. Pet. App. 4a.[3] Based

[2] Shortly after the arson, a sheriff's deputy drove by respondent's residence and noticed that the hood of the pick-up truck parked in front was warm, suggesting a recent arrival. In addition, an associate of respondent was seen disposing of what appeared to be pipe bombs, and the associate's pick-up truck contained explosive materials and brass padlocks that appeared to match those taken from the PG&E power vault. Pet. App. 3a-4a; J.A. 14-16, 35-40.

[3] The officer who conducted the search subsequently attested that before searching respondent's apartment, he was aware that respondent was on probation "and that his residence was subject

on the evidence found in the search—including detonation cord, ammunition, liquid chemicals, chemistry and electrical manuals, drug paraphernalia, and a brass padlock stamped "PG&E"—respondent was arrested. J.A. 17; Pet. App. 4a-5a; C.A. E.R. 54.

2. Respondent was subsequently indicted by a federal grand jury for conspiracy to commit arson, in violation of 18 U.S.C. 371 and 18 U.S.C. 844(i) (1994 & Supp. V 1999); and for being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). J.A. 7-10. Respondent moved to suppress the evidence obtained in the June 3 search. Pet. App. 5a.

Relying principally on the Ninth Circuit's decision in *United States* v. *Ooley*, 116 F.3d 370 (1997), cert. denied, 524 U.S. 963 (1998), the district court granted respondent's motion to suppress. Pet. App. 15a-38a. The court explained that "[a]lthough not directly addressing the consent issue, [*Ooley*], implicitly if not directly, stands for the proposition that acceptance of a search clause as a condition of probation does not fully abrogate a defendant's Fourth Amendment rights." *Id.* at 25a. The court found that the detective who

to search at any time, with or without a warrant, warrant of arrest or probable cause, by any probation officer or law enforcement officer." J.A. 20. The officer explained that under California law, he was entitled to conduct such a search without prior approval from any probation officer, J.A. 20-21, and that in any event "because [respondent] was on summary probation, there was no probation officer specifically assigned to [respondent] that [the officer] could contact," J.A. 21. The officer further explained that at the time he conducted the search, he "believed there was probable cause to obtain a warrant to search [respondent's] apartment based upon [the officer's] ongoing investigation of [respondent's] criminal activities," and that he would have applied for such a warrant if the search condition had not been applicable. *Ibid.*; see also J.A. 27.

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conducted the search had a "reasonable suspicion" that respondent may have been involved with incendiary materials, "the manufacture of which would be inconsistent with the rehabilitative aspects of his probation." *Id.* at 30a. The court held, however, that the search was conducted for the purpose of obtaining evidence in a criminal investigation into arson or manufacture of incendiary devices. *Id.* at 33a. Based on its conclusion that the search of respondent's house was undertaken for investigative rather than probationary purposes, the court held that the search was invalid and that the items seized therein should be suppressed. *Id.* at 33a-37a.

3. The court of appeals affirmed. Pet. App. 1a-14a.

The court of appeals acknowledged that "a person can consent to a search of his home," and that "[t]here * * * can be little doubt that [respondent] did consent to searches when he agreed to the terms of his probation." Pet. App. 7a-8a. The court stated, however, that prior Ninth Circuit decisions "have made it clear that [a probationer's] consent must be seen as limited to probation searches, and must stop short of investigation searches. We simply have refused to recognize the viability of a more expansive probationary consent to search term." *Id.* at 8a. The court of appeals found no clear error in the district court's determination that the sheriff's department was investigating criminal activity, rather than conducting a "probation search," since the searching officer was interested in "ending the string of crimes" of which respondent was suspected and was not "interested in [respondent's] rehabilitation." *Id.* at 10a. While acknowledging that the searching officer in this case "had drawn some very good inferences from the facts," the court found that the officer "was using the probation term as a subterfuge to

enable him to search [respondent's] home without a warrant." *Ibid.*[4]

The court of appeals also rejected the government's contention that *Whren* v. *United States*, 517 U.S. 806 (1996), had superseded prior Ninth Circuit decisions distinguishing between probation searches and investigation searches. The Court in *Whren* held that a traffic stop based on probable cause is objectively reasonable, and therefore valid under the Fourth Amendment, regardless of the subjective motivation of the seizing officer. *Id.* at 811-819. The court of appeals found that holding to be inapplicable to this case, explaining that

> [h]ere the issue is not whether a search or seizure with probable cause should be invalidated because of an officer's subjective intentions. It is, rather, whether, without another basis for a warrantless home search, there was consent to the search in the first place. That is a different question entirely. It depends on whether the consent covers what the officer did.

Pet. App. 11a. The court acknowledged that "the California Supreme Court disagrees with our *Whren* analysis." *Ibid.* (citing *People* v. *Woods*, 21 Cal. 4th 668, 677-681 (1999), cert. denied, 529 U.S. 1023 (2000)). It stated, however, that the California Supreme Court "does not control our reading of federal constitutional

[4] The court of appeals acknowledged that "a true probation search can serve th[e] ends" of deterring the probationer from endangering the community and engaging in additional criminal activity. Pet. App. 13a. The court refused, however, to hold that the search in this case could be sustained as serving the same purposes. The court stated that to uphold the search on that basis would "indirectly eliminate our cases which rely on the difference between probation and investigation searches." *Ibid.*

law, and for the reasons already stated, we find its analysis unpersuasive." *Ibid.*

SUMMARY OF ARGUMENT

As a condition of his probation, respondent agreed to submit his person and property to a search at any time, with or without a search warrant or reasonable cause, at the request of any probation or law enforcement officer. That consent to search was valid and rendered the search of respondent's house by law enforcement officers reasonable within the meaning of the Fourth Amendment.

A. By its plain terms, respondent's consent extended to searches conducted for the purpose of investigating possible violations of the criminal law. There is no language in the consent form that limits its scope to searches conducted for any particular reason. And decisions of the California Supreme Court interpreting similar or identical consent-to-search provisions in other probation agreements confirm that searches conducted for investigative purposes fall within the scope of the consent. Accordingly, the search conducted of respondent's house was within the scope of his consent and was therefore reasonable, unless the Fourth Amendment rendered the consent invalid.

B. A consent to search in a probation agreement is valid and enforceable as applied to a search conducted for investigative purposes. Nothing in the Fourth Amendment prevents a defendant from granting such consent as a condition of release on probation.

1. A search conducted pursuant to voluntary consent need not be based on probable cause or authorized by a judicial warrant. See *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 222 (1973). While consent must be given voluntarily, a consent to search may be voluntary even

if it is motivated by a desire to avoid some concrete disadvantage or to obtain a benefit from the government. An individual may also give valid and binding prospective consent to a category of searches to be performed at unspecified times in the future. See *Zap* v. *United States*, 328 U.S. 624 (1946).

2. The rule that consent renders a search lawful accords with the general principle that an individual may choose to forgo assertion of his constitutional rights, either unilaterally or pursuant to an agreement with the government under which he receives a promise of favorable treatment. For example, the Court has repeatedly recognized that a criminal defendant's guilty plea may be valid and enforceable even when it is motivated by the defendant's belief that he is likely to face greater punishment if he proceeds to trial. A defendant may similarly agree to conditions on his release, rather than face the more onerous restrictions on his liberty that he would experience as a prisoner. Enforcing such consent-to-search terms furthers the long-term interests of defendants as a class, since trial judges might be less willing to offer probation if they lacked assurance that the probationer's compliance with the conditions of release could be closely monitored.

3. This Court's "unconstitutional conditions" jurisprudence suggests that a State may not condition an individual's release on probation on his agreement to waive a constitutional right that is wholly unrelated to his status as a probationer. A requirement that probationers consent to search, however, directly furthers the State's interest in the effective administration of its probation system. Because the premise of conditional release is that probationers require more careful monitoring than the average citizen, consents to such monitoring through searches are reasonably related to the benefit offered by the government as a quid pro quo.

4. A probationer's consent to search given as a condition of release is not rendered involuntary by the fact that the alternative is incarceration. This Court has repeatedly recognized that a guilty plea is not rendered involuntary simply because it is motivated by a desire to avoid greater punishment. Likewise, the voluntariness of the consent term at issue here cannot be attacked on the ground that release on probation, even with a consent-to-search condition, is substantially less onerous than incarceration. The government does not coerce an individual simply by presenting him with a choice in which one of the alternatives is plainly more attractive than the other.

5. There is no sound basis for limiting the validity of a probationer's consent to "probation" searches rather than "investigation" searches. As an initial matter, the validity of a consent search should not turn on the subjective motivation of the searching officer, but should turn instead on the objective justification for the intrusion in question. See *Whren* v. *United States*, 517 U.S. 806 (1996). In any event, because the most fundamental term of probation is that an individual must refrain from committing further crimes, a search intended to confirm or dispel the suspicion that a probationer has engaged in additional criminal activity directly serves a core probation purpose.

ARGUMENT

A SEARCH TO INVESTIGATE CRIMINAL ACTIVITY BASED ON THE CONSENT OF A PROBATIONER GIVEN AS A CONDITION OF RELEASE FROM CUSTODY IS VALID UNDER THE FOURTH AMENDMENT

Respondent was required, as one of the conditions of his probation, to "[s]ubmit his * * * person, property, place of residence, vehicle, personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer." J.A. 50. Respondent signed a form that stated: "I HAVE RECEIVED A COPY, READ AND UNDERSTAND THE ABOVE TERMS AND CONDITIONS OF PROBATION AND AGREE TO ABIDE BY SAME." *Ibid.* The California Supreme Court has repeatedly held that a criminal defendant's execution of such a form constitutes a valid and enforceable consent to future searches. In reaching that conclusion, that court has relied on the fact that, as a matter of California law, a defendant cannot be compelled to accept probation against his will. Because the defendant's acceptance of probation reflects a voluntary choice, the California Supreme Court has explained, a search conducted pursuant to a term of the probation agreement like the one quoted above is properly treated as consensual and therefore reasonable under the Fourth Amendment. See pp. 11-12, 17, *infra*.

The court of appeals recognized in this case that "a person can consent to a search of his home," and that respondent "did consent to searches when he agreed to the terms of his probation." Pet. App. 7a-8a. The court concluded, however, that respondent's "consent must

be seen as limited to probation searches, and must stop short of investigation searches." *Id.* at 8a. That conclusion is incorrect. Both the language of the consent form and its consistent interpretation by the California courts support the conclusion that respondent consented to searches for any reason, not simply to "probation searches." And the consent that respondent gave is valid under the Fourth Amendment and thus justifies the search in this case.

A. Respondent's Consent Extends By Its Terms To Searches Conducted For Investigative Purposes

1. A consent-to-search term, sometimes known as a "Fourth Waiver," see *United States* v. *Ooley*, 116 F.3d 370, 371 (9th Cir. 1997), cert. denied, 524 U.S. 963 (1998), is a common term of probation in California. The California Supreme Court has held that persons convicted of crimes within the State may properly be required to consent to future warrantless searches as a condition of probation, and that a consent to search obtained in that manner is valid and enforceable. See, *e.g.*, *People* v. *Bravo*, 43 Cal. 3d 600, 605-611 (1987), cert. denied, 485 U.S. 904 (1988); *People* v. *Mason*, 5 Cal. 3d 759, 764-766 (1971), cert. denied, 405 U.S. 1016 (1972). That court has also held that a state probationer's consent to search is not ordinarily limited to searches based on individualized suspicion of wrongdoing. Before the decision in *Bravo*, "some [California] Courts of Appeal ha[d] held that search conditions in probation agreements require 'reasonable cause'—defined as something less than probable cause—to search." *Bravo*, 43 Cal. 3d at 607. In *Bravo*, however, the California Supreme Court held that "if a sentencing judge believes that a 'reasonable cause' requirement is warranted in the particular case, * * * he has the

discretion to place such language in the probation search condition. Absent such express language, however, a reasonable-cause requirement will not be implied." *Id.* at 607 n.6.

2. As this Court explained in *Florida* v. *Jimeno*, 500 U.S. 248, 251 (1991), "[t]he standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?" As a condition of probation, respondent agreed without qualification to "[s]ubmit his * * * person, property, place of residence, vehicle, [and] personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer." J.A. 50; Pet. App. 4a. There is no language in that consent that limits its scope to searches conducted for a particular reason. To the contrary, respondent's express consent to searches "by any probation officer or law enforcement officer" belies any inference of a distinction between probation and investigation searches.

3. Because consent-to-search terms similar or identical to this one are frequently included in California probation agreements, a "reasonable person" in respondent's position would be justified in construing the agreement by reference to California Supreme Court precedents. Relevant state court authority makes clear that a consent search provision like respondent's is not limited to "probation searches."

In *People* v. *Bravo*, *supra*, the court upheld a search by law enforcement officers who were acting on a tip that the probationer was involved in the sale of narcotics. 43 Cal. 3d at 602-603. The court made clear that the consent authorized searches to fulfill "the rehabilitative and reformative purposes of probation *or other legitimate law enforcement purposes.*" *Id.* at 610 (emphasis added). In *People* v. *Woods*, 21 Cal. 4th 668 (1999), cert. denied, 529 U.S. 1023 (2000), the court held that a comparable consent-to-search provision authorized a search of the probationer's residence "whether the purpose of the search is to monitor the probationer or to serve some other law enforcement purpose, or both." *Id.* at 681; see *id.* at 678 (explaining that this Court's decision in *Griffin* v. *Wisconsin*, 483 U.S. 868 (1987), "supports the general conclusion that a regulation allowing warrantless searches of probationers serves to promote the rehabilitative purposes of probation *and to protect the public from probationer misconduct*") (emphasis added). In *People* v. *Robles*, 23 Cal. 4th 789, 795 (2000), the court similarly observed that "[b]y allowing close supervision of probationers, probation search conditions serve to promote rehabilitation and reduce recidivism while helping to protect the community from potential harm by probationers." The pertinent California Supreme Court decisions therefore provide no basis on which respondent could plausibly have understood his own consent to exclude searches conducted for investigative purposes.[5]

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[5] In *Woods* the court accepted, as supported by substantial evidence, the trial court's finding that the searching officer's "sole reason for searching the [probationer's] residence was to discover evidence against [the probationer's boyfriend] and not to investigate whether [the probationer] had violated her probation." 21 Cal. 4th at 674. The court nevertheless held that the search was authorized by the consent that the probationer had given as a condition of release on probation. *Id.* at 674-682. The court in *Woods* concluded that a focus on the subjective intent of the searching officer was inconsistent with this Court's decision in *Whren* v. *United States*, 517 U.S. 806 (1996). 21 Cal. 4th at 678-

In short, neither the text of respondent's probation agreement, nor prior California Supreme Court cases involving similar agreements, furnish any basis for construing respondent's consent to exclude searches conducted for investigative purposes. Rather, respondent gave unqualified consent to searches by law enforcement officers and probation officers regardless of their purpose. That consent authorized the search in this case unless, as a matter of constitutional law, a consent of that character is invalid. As we now show, respondent's consent is not constitutionally infirm.

B. Respondent's Consent To Search Was Valid And Enforceable As Applied To Searches Conducted For Investigative Purposes

1. An individual may voluntarily give advance consent to a search

Although the Fourth Amendment generally requires that a search be authorized by a judicial warrant based upon probable cause, it is "well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 219 (1973); accord, *e.g.*, *Illinois* v. *Rodriguez*, 497 U.S. 177, 181 (1990); *Washington* v. *Chrisman*, 455 U.S. 1, 9-10 (1982). That principle is consistent with the general rule, articulated "in the context of a broad array of constitutional and

680. It explained that "whether the purpose of the search is to monitor the probationer or to serve some other law enforcement purpose, or both, the search in any case remains limited in scope to the terms articulated in the search clause and to those areas of the residence over which the probationer is believed to exercise complete or joint authority." *Id.* at 681 (citation omitted).

statutory provisions," that "presumes the availability of waiver." *New York* v. *Hill*, 528 U.S. 110, 114 (2000) (internal quotation marks omitted); see also *United States* v. *Mezzanatto*, 513 U.S. 196, 201 (1995) ("[a] criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution"); *Peretz* v. *United States*, 501 U.S. 923, 936 (1991) ("The most basic rights of criminal defendants are * * * subject to waiver.").

Consent must be voluntary to be constitutionally valid, *Schneckloth*, 412 U.S. at 222; *Bumper* v. *North Carolina*, 391 U.S. 543, 548 (1968), but an individual's consent to search may be deemed voluntary, for Fourth Amendment purposes, even if it is motivated by the subject's belief that refusal to consent will result in concrete disadvantages. In describing the benefits of consent searches, the Court in *Schneckloth* observed that "[i]f the [consent] search is conducted and proves fruitless, that in itself may convince the police that an arrest with its possible stigma and embarrassment is unnecessary, or that a far more extensive search pursuant to a warrant is not justified. In short, a search pursuant to consent may result in considerably less inconvenience for the subject of the search." 412 U.S. at 228. Plainly, then, a consent search cannot be found involuntary simply because an individual consents out of a desire to avoid a greater intrusion.

This Court's decision in *Zap* v. *United States*, 328 U.S. 624 (1946), reflects the view that an individual's consent to search may be deemed voluntary even when that consent is a required condition for receipt of a valuable government benefit. The petitioner in *Zap* "entered into contracts with the Navy Department under which he was to do experimental work on airplane wings and to conduct test flights." *Id.* at 626.

Pursuant to statutory requirement (*ibid.*), the contract between the parties stated that "[t]he accounts and records of the contractor shall be open at all times to the Government and its representatives, and such statements and returns relative to costs shall be made as may be directed by the Government." *Id.* at 627. Government agents subsequently inspected petitioner's business books and records over his objection. *Ibid.* This Court held that the search was lawful, explaining that "when petitioner, in order to obtain the Government's business, specifically agreed to permit inspection of his accounts and records, he voluntarily waived such claim to privacy which he otherwise might have had as respects business documents related to those contracts." *Id.* at 628.[6]

Zap further establishes the proposition—central to this case—that a consent to search may be granted in advance, and without specific restrictions. The defendant in *Zap* did not give consent at the time the search was conducted; to the contrary, he attempted (unsuccessfully) to prevent the search from occurring. 328 U.S. at 627. The Court nevertheless found that the defendant was bound by his prior contractual commitment to permit inspection of his books and records. *Zap* makes clear that an individual may give valid and

[6] The three dissenting Justices in *Zap* were of the view that an unlawful seizure had occurred in the course of the search and that the seized item therefore should not have been admitted into evidence at petitioner's trial. See 328 U.S. at 632-633 (Frankfurter, J., dissenting). Those Justices agreed with the majority, however, that "the Government had authority, as a result of its contract with the petitioner and the relevant statutes, to inspect the petitioner's books and records." *Id.* at 632.

binding prospective consent to a *category* of searches to be performed at unspecified times in the future.[7]

Under California law, a criminal defendant may not be compelled to accept probation. Rather, "[i]f the defendant considers the conditions of probation more harsh than the sentence the court would otherwise impose, he has the right to refuse probation and undergo the sentence." *People* v. *Mason*, 5 Cal. 3d at 764 (quoting *In re Bushman*, 1 Cal. 3d 767, 776 (1970)). But under *Zap*, a defendant may validly choose to accept the benefits of release with an advance consent to search in lieu of the prison sentence that would otherwise be carried out. *Id.* at 765 ("The *Zap* case is controlling here, for it upheld the validity of an advance waiver of Fourth Amendment rights akin to the provisions of the probation condition before us.").[8]

[7] The judgment in *Zap* was subsequently vacated on other grounds. See *Zap* v. *United States*, 330 U.S. 800 (1947). This Court has continued to treat *Zap* as good law, however, and has cited it as authority for the proposition that a search based on consent is lawful notwithstanding the absence of a judicial warrant and/or probable cause. See *Schneckloth*, 412 U.S. at 219; *Katz* v. *United States*, 389 U.S. 347, 358 n.22 (1967); *Texas* v. *Brown*, 460 U.S. 730, 736 (1983) (plurality opinion).

[8] In assessing the validity of Fourth Waiver searches of adult probationers, the California Supreme Court has continued to rely on a consent rationale. See *People* v. *Woods*, 21 Cal. 4th at 674-676. That court has recognized, however, that parolees and juvenile probationers, who are not offered the opportunity to decline conditional release, cannot be said to have consented to searches conducted without a warrant and/or probable cause. In validating warrantless searches of such offenders without particularized cause, the California Supreme Court has instead relied on the theory that such persons have a reduced expectation of privacy in light of the conditional nature of their release, and that the interest in maintaining close supervision of such persons justifies the intrusions in question. See *In re Tyrell J.*, 8 Cal. 4th 68, 81-90

2. *The relinquishment of a constitutional right may be made through an agreement with the government*

The rule that an individual may voluntarily consent to a search that might otherwise be prohibited by the Fourth Amendment accords with the general principle that an individual may, within broad limits, enter into agreements with the government under which he forgoes the exercise of constitutional rights in return for a promise of favorable treatment. Such agreements are not rendered unenforceable simply because the waiver of rights is prompted by the desire to obtain a benefit or avoid a burden, or because the individual is forced to choose between unattractive alternatives.[9]

This Court has repeatedly recognized that a criminal defendant's guilty plea, which waives a panoply of trial rights, may be valid and enforceable even where it is motivated by the defendant's belief that he is likely to face greater punishment if he proceeds to trial. In *Brady* v. *United States*, 397 U.S. 742, 755 (1970), for example, the Court held that "a plea of guilty is not

(1994) (juvenile probationers), cert. denied, 514 U.S. 1068 (1995); *People* v. *Reyes*, 19 Cal. 4th 743, 747-754 (1998) (adult parolees), cert. denied, 526 U.S. 1092 (1999).

[9] The procedural prerequisites to a valid relinquishment of constitutional rights vary depending on the right at issue, see generally *United States* v. *Olano*, 507 U.S. 725, 733 (1993), but for Fourth Amendment rights, this Court has held that the subject need not be specifically aware of his right to refuse consent before he may voluntarily consent to a search. *Ohio* v. *Robinette*, 519 U.S. 33, 39-40 (1996); *Schneckloth*, 412 U.S. at 227; see *id.* at 227-248. In any event, nothing in the court of appeals' opinion in this case suggests that its holding turned on the failure of California officials to engage in any particular colloquy with respondent at the time he signed the probation agreement.

invalid merely because entered to avoid the possibility of a death penalty." In a variety of situations, the Court recognized, a criminal "defendant might never plead guilty absent the possibility or certainty that the plea will result in a lesser penalty than the sentence that could be imposed after a trial and a verdict of guilty." *Id.* at 751. The Court "decline[d] to hold, however, that a guilty plea is compelled and invalid under the Fifth Amendment whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged." *Ibid.*; accord, *e.g.*, *Corbitt* v. *New Jersey*, 439 U.S. 212, 218-223 (1978); *North Carolina* v. *Alford*, 400 U.S. 25, 31 (1970).[10]

This Court has since held that the government may attempt through negotiation to persuade a defendant to plead guilty to a criminal charge. See, *e.g.*, *Mezzanatto*, 513 U.S. at 209-210 ("[t]he plea bargaining process necessarily exerts pressure on defendants to plead guilty and to abandon a series of fundamental rights, but we have repeatedly held that the government may encourage a guilty plea by offering substantial benefits in return for the plea") (internal

[10] As the Court explained in *McGautha* v. *California*, 402 U.S. 183 (1971),

> [t]he criminal process, like the rest of the legal system, is replete with situations requiring the making of difficult judgments as to which course to follow. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose.

Id. at 213 (citation and internal quotation marks omitted).

quotation marks omitted); *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363 (1978) ("acceptance of the basic legitimacy of plea bargaining necessarily implies rejection of any notion that a guilty plea is involuntary in a constitutional sense simply because it is the end result of the bargaining process"; defendant's guilty plea held to be voluntary even though it "may have been induced * * * by fear of the possibility of a greater penalty upon conviction after a trial"). The Court's plea-bargaining cases do not suggest that a process of negotiation is a *prerequisite* to a valid plea. Rather, the Court has simply recognized that the government does not coerce the plea by giving the defendant assurance of its likely beneficial consequences, or even by affirmatively encouraging the defendant to forgo exercise of his constitutional rights. That the terms of respondent's probation on the state charges appear not to have been the subject of negotiation therefore does not call into question the voluntariness of respondent's consent to search. It is sufficient that respondent gave his assent to those terms as part of a voluntary choice.

In *Griffin* v. *Wisconsin*, *supra*, this Court observed that "[p]robation is simply one point (or, more accurately, one set of points) on a continuum of possible punishments ranging from solitary confinement in a maximum-security facility to a few hours of mandatory community service." 483 U.S. at 874.[11] Insofar as the

[11] In *Griffin*, this Court upheld a warrantless search of a probationer's house based on a state regulation that permitted such searches where "reasonable grounds" existed to believe that contraband would be found. The Court did not adopt a "reasonable grounds" (or other individualized suspicion) requirement as a constitutional floor, and it did not consider whether a person offered probation could validly consent to searches without individualized suspicion as a condition of release.

Constitution is concerned, respondent could have validly entered into a plea agreement that not only specified the length of his incarceration, but that provided as well for confinement in a particular penal institution with a particular level of restraint. That being the case, there is no reason that respondent could not also enter into an agreement providing for a less severe punishment—*i.e.*, release into the community on the condition that his residence could be searched at any time. See *Bravo*, 43 Cal. 3d at 609 ("A probationer's waiver of his Fourth Amendment rights is no less voluntary than the waiver of rights by a defendant who pleads guilty to gain the benefits of a plea bargain.") (citing *Bordenkircher*, 434 U.S. at 360-364). Indeed, enabling defendants to consent to such search terms may further their long-term interests as a class. As the California Supreme Court observed in *Bravo*, if "a probationer's waiver of Fourth Amendment rights were either impermissible or limited to searches conducted only upon a reasonable-suspicion standard, the opportunity to choose probation might well be denied to many felons by judges whose willingness to offer the defendant probation in lieu of prison is predicated upon knowledge that the defendant will be subject to search at any time for a proper probation or law enforcement purpose." *Ibid.*

3. *Requiring consent to search as a condition of probation is not an unconstitutional condition*

The fact that a California defendant must agree to probation does not mean that a sentencing judge's choice of probation terms is free from any constitutional constraint. "Under the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right * * * in

exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the" right whose waiver is at issue. *Dolan* v. *City of Tigard*, 512 U.S. 374, 385 (1994). This Court's unconstitutional conditions jurisprudence suggests that a State may not condition an individual's release on probation upon his agreement to forgo the exercise of a constitutional right—*e.g.*, the First Amendment right to engage in religious observance, or to make public statements critical of the government—that is wholly unrelated to his status as a probationer.

A requirement that probationers consent to search, by contrast, directly furthers the State's interest in the effective administration of its probation system. The California Supreme Court has explained that, as a matter of state law, "[a] condition of probation * * * is invalid if it (1) has no relationship to the crime of which the defendant is convicted, (2) relates to conduct that is not itself criminal, or (3) requires or forbids conduct that is not reasonably related to future criminality." *People* v. *Mason*, 5 Cal. 3d at 764 (quoting *In re Bushman*, 1 Cal. 3d at 776-777). The court in *Mason* concluded, however, that "a condition of probation which requires a prior narcotics offender to submit to a search meets the test set forth in *Bushman*, since that condition is reasonably related to the probationer's prior criminal conduct and is aimed at deterring or discovering subsequent criminal offenses." *Ibid.*

The same reasoning explains why a consent-to-search term is not an unconstitutional condition as a matter of federal law. Probationers present a heightened risk of committing further criminal or other antisocial acts, thus justifying close monitoring and supervision. See *Griffin*, 483 U.S. at 880 ("it is the very assumption of the institution of probation that the probationer is in need of rehabilitation and is more likely than the ordinary citizen to violate the law"). The purpose of conditional release is to assist in the probationer's reintegration into the community, while minimizing the threat to the public safety and welfare that release may entail. A search designed to assess the probationer's compliance with the conditions of his release is therefore reasonably related to the benefit offered by the government as a quid pro quo.

4. *A probationer's consent to search is not invalid simply because the alternative is imprisonment*

A probationer's consent to search given as a condition of release is not rendered involuntary by the fact that the alternative is incarceration. It has been suggested that a potential probationer or parolee has no choice but to accept a consent to search provision.[12] That suggestion appears to rest on one of two propositions. First is the notion that an individual would not, under any circumstances, make a voluntary decision to accept a prison term. That proposition is demonstrably false: criminal defendants can and often do enter pleas of guilty (with or without plea agreements) that they know will result in substantial periods of incarceration, generally because they regard their alternatives as even more unattractive. This Court has repeatedly recognized that a guilty plea is not rendered involuntary simply because it is motivated by a desire to avoid greater punishment. See pp. 18-20, *supra*.

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[12] See, *e.g.*, 4 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 10.10(b), at 764-765 (3d ed. 1996) ("to speak of consent in this context is to resort to a manifest fiction, for the probationer who purportedly waives his rights by accepting such a condition has little genuine option to refuse") (footnote and internal quotation marks omitted).

Alternatively, the view that a probationer lacks any true choice in the matter may rest instead on the perception that no one would choose to spend time in prison *in preference to release on probation* because probation, even with a consent-to-search condition, is substantially less onerous than incarceration. That reasoning is also flawed. The government cannot be said to coerce an individual simply by presenting him with a choice in which one of the alternatives is plainly more attractive than the other. No one would suggest, for example, that a defendant's guilty plea is involuntary if the government offers him a particularly favorable plea agreement. In short, no legal principle supports the view that an individual's waiver of constitutional rights is rendered unenforceable whenever the benefits of that waiver substantially outweigh its costs.

5. *There is no basis for limiting the validity of respondent's consent to "probation searches"*

The court of appeals acknowledged both that "a person can consent to a search of his home," and that respondent "did consent to searches when he agreed to the terms of his probation." Pet. App. 7a-8a. The court held, however, that respondent's "consent must be seen as limited to probation searches, and must stop short of investigation searches." *Id.* at 8a; see also *ibid.* ("We simply have refused to recognize the viability of a more expansive probationary consent to search term."). Although the court did not offer a precise definition of the term "probation search," it apparently had in mind a search conducted for rehabilitative or similar purposes. See *id.* at 10a (stating that the searching officer and his colleagues "were not a bit interested in [respondent's] rehabilitation" but instead "were interested in investigating and ending the string of crimes of which

[respondent] was thought to be the perpetrator"). The court of appeals' distinction between "probation" and "investigation" searches is flawed. First, the proper focus in this area of Fourth Amendment analysis is on the objective justification for the officer's conduct, not on its subjective purpose. Second, identifying criminal activity by a probationer is centrally related to a critical term of probation: that the individual refrain from further violations of the criminal law.

a. In *Whren* v. *United States*, 517 U.S. 806 (1996), this Court stated that it had consistently "been unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers." *Id.* at 813. The Court explained that the "principal basis" for its refusal to consider the subjective motivation of the searching or seizing officer "is simply that the Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent." *Id.* at 814. See also *Bond* v. *United States*, 529 U.S. 334, 338 n.2 (2000) (in determining whether an officer's actions constitute a "search," "the issue is not [the officer's] state of mind, but the objective effect of his actions").[13]

---

[13] In *City of Indianapolis* v. *Edmond*, 121 S. Ct. 447 (2000), the Court held that a traffic checkpoint violates the Fourth Amendment when its "primary purpose" is to serve general criminal law enforcement interests in interdicting narcotics. *Id.* at 458. The Court explained that, in contrast to cases such as *Whren* and *Bond*, "our cases dealing with intrusions that occur pursuant to a general scheme absent individualized suspicion have often required an inquiry into purpose at the programmatic level." *Id.* at 457. The Court noted that "subjective intent was irrelevant in *Bond* because the inquiry that our precedents required focused on the objective effects of the actions of an individual officer." *Ibid.* This Court's consent-search precedents similarly focus on objective considerations, both in analyzing the scope of consent, see *Florida* v.

The seizure in *Whren* was based on probable cause to believe that a traffic violation had been committed, see 517 U.S. at 810, but a property owner's voluntary consent to search justifies a similar Fourth Amendment conclusion: the search is valid if it is within the scope of the consent, objectively construed, regardless of a particular searching officer's motive or purpose. The intrusion is the same in either case, and nothing in this Court's decisions suggests that the propriety of a consent search depends on the searching officer's subjective motivation in requesting or acting upon the consent.[14]

Jimeno, *supra*, and in determining the reasonableness of an officer's reliance on consent, see *Illinois* v. *Rodriguez*, *supra*. The objective approach of *Whren* and *Bond* is therefore applicable here.

[14] Different considerations would be implicated if the officers who conducted a Fourth Waiver search were alleged to have acted for constitutionally impermissible reasons—*e.g.*, on the basis of the probationer's race or religion. Compare *Whren*, 517 U.S. at 813 ("agree[ing] * * * that the Constitution prohibits selective enforcement of the law based on considerations such as race," while observing that "the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment"). But neither respondent nor the court of appeals has suggested that the detective who conducted the search in this case harbored any such impermissible motives. To the contrary, although the court of appeals held that the warrantless search in this case violated the Fourth Amendment, it recognized that the officer's desire to search respondent's apartment was prompted by legitimate law enforcement considerations. See Pet. App. 10a (stating that the searching officer and his colleagues "were interested in investigating and ending the string of crimes of which [respondent] was thought to be the perpetrator * * * and had drawn some very good inferences from the facts").

b. Even if consideration of the searching officer's subjective purpose were otherwise appropriate in this context, the purported distinction between "probation" and "investigation" searches is unsound. A probationer has by definition been convicted of a criminal offense, and "it is the very assumption of the institution of probation that the probationer is in need of rehabilitation and is more likely than the ordinary citizen to violate the law." *Griffin*, 483 U.S. at 880. And the most fundamental term of probation is that an individual must refrain from committing further crimes. As the Court in *Griffin* explained, restrictions on a probationer's liberty "are meant to assure that the probation serves as a period of genuine rehabilitation and that the community is not harmed by the probationer's being at large. These same goals require and justify the exercise of supervision to assure that the restrictions are in fact observed." *Id.* at 875 (citation omitted).

The officer who searched respondent's apartment was not, it is true, specifically tasked with the supervision of probationers. The officer's investigative efforts focused upon respondent for reasons unrelated to his probation status, and the officer would likely have wished to search respondent's apartment even if respondent had not been a probationer. See note 3, *supra*. It does not follow, however, as the court of appeals believed, that the searching officer "was using the probation term as a subterfuge." Pet. App. 10a. Where (as here) law enforcement officials come to suspect that a probationer is engaged in additional criminal activity, a search designed to confirm or dispel that suspicion directly serves an important probation purpose, even though the searching officer views his role as the detection and investigation of crime rather than the monitoring of specific individuals. Uncovering criminal

acts by probationers allows the government to protect the community against harms flowing from their conditional release, either by revoking probation or beginning a new prosecution. The State may therefore make release on probation contingent upon the probationer's voluntary consent to searches by police officers who are investigating crimes, as well as to searches that are conducted by probation officers or specifically conceived as measures for administering the probation system.[15]

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[15] In upholding the Wisconsin regulation authorizing probation officers to conduct warrantless searches based on "reasonable grounds" to believe that a probation violation had occurred in *Griffin*, the Court noted that a probation officer is not "the police officer who normally conducts searches against the ordinary citizen." 483 U.S. at 876. The search in *Griffin* took place pursuant to an administrative scheme. Respondent, however, specifically consented to searches "by any probation officer or law enforcement officer." J.A. 50. Whatever relevance the probation officer's distinct status and responsibilities may have to the propriety of an *administrative* program of non-consensual searches, nothing in *Griffin* precludes a State from requiring consent to searches by a broader category of law enforcement officers as a condition of release on probation.

In any event, nothing in *Griffin* suggests that an officer's motivation for conducting a *particular* search is in any way relevant to the constitutional analysis. The search in that case was conducted by two probation officers and three plainclothes policemen, based on a tip that guns were or might be present in Griffin's apartment. 483 U.S. at 871. When the officers found a handgun, Griffin was arrested and charged with possession of a firearm by a convicted felon, which is itself a felony under Wisconsin law. *Id.* at 871-872. *Griffin* thus involved a search for evidence of criminal activity. The direct and foreseeable result of the search was the probationer's arrest—and this Court reviewed his conviction for the offense that led to that arrest.

The court of appeals appeared to acknowledge that a valid probation search may be based *in part* on the desire to detect wrongdoing. Pet. App. 10a. The court suggested, however, that any search directed *only* at that goal (rather than at the rehabilitation of the probationer) cannot be regarded as a legitimate probation search. *Ibid.* That conclusion is without basis. Even where a search is conducted solely to determine whether a probationer has abused his "conditional liberty" (*Griffin*, 483 U.S. at 874) by committing crimes that warrant prosecution, the search helps to ensure "that the community is not harmed by the probationer's being at large" (*id.* at 875) and thereby directly serves a core probation purpose.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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UNITED STATES OF AMERICA,

Petitioner,

v.

MARK JAMES KNIGHTS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Can a court require a defendant to accept, as a condition of probation, a search condition that is unconstitutionally broad under *Griffin v. Wisconsin*, 483 U.S. 868 (1987)?

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STATEMENT OF THE CASE

In the early hours of June 2, 1998, a Pacific Gas & Electric power transformer and adjacent Pacific Bell telecommunications vault in Napa, California, were pried open and set on fire. J.A. 13-14.[1] Although there were no witnesses to the vandalism, Respondent Mark Knights and an associate were suspected, based on an ongoing investigation Napa law enforcement officers had been conducting for approximately two years into a series of arsons in the area. *Id.* at 12-14. At 8:00 a.m. on June 3, 1998, local law enforcement officers broke down the door of Knights' apartment building and conducted a warrantless search of his apartment. Pet. App. 4a. Knights was in bed with his girlfriend when the officers entered his room. J.A. 16.

The day before the search, Napa County Sheriff's Department Detective Todd Hancock prepared an "Operations Order" for his supervisor describing the basis for his belief that Knights had participated in the recent arson and seeking permission to have other officers help with the search. J.A. 26; Supp. Excerpt of Record 1-3 (copy of operations order). Eight hours before the search, law enforcement officers set up the surveillance of Knights' apartment. Pet. App. 3a. In the hours immediately preceding the search, Detective Hancock gathered staff for the search, briefed them on the situation, and made preparations for the search. J.A. 30.

At no time during the day prior to the search did Detective Hancock seek a warrant to search Knights'

---

[1] The Court of Appeals mistook the date for June 1. *See* Pet. App. 2a.

apartment. Pet. App. 4a. Instead, Detective Hancock reviewed records in the Napa County Sheriff's Department and determined that Knights was on probation and was subject to a search condition. *Id.*; J.A. 30-31. Detective Hancock relied on the existence of this search clause to search Knights' apartment instead of seeking a search warrant. Detective Hancock did not make any effort to contact the probation office or the sentencing judge before the search. Pet. App. 33a.[2]

Knights had been placed on summary probation[3] on May 29, 1998, as a result of his conviction for a misdemeanor drug offense. J.A. 50. There is no evidence that this conviction resulted from a negotiated agreement. The only evidence in the record regarding the search condition is contained in the Napa County "Probation Order," dated May 29, 1998. *Id.* The pre-printed order states that the Defendant, "having been convicted" of a misdemeanor violation, is "hereby ordered [to a] term of probation." *Id.* (all capitals in original). Possible standard terms and conditions are listed, with a box to check beside each one. One of the boxes checked was the box next to the search condition, which required the defendant to

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[2] Under California law, in the absence of an assigned probation officer, it is the judge who imposed sentence who retains the power to supervise the probationer, punish violations of probation conditions, and revoke probation. Pet. App. 33a.

[3] Under California law, "summary probation" (now called "conditional sentence") is an unsupervised form of release reserved for people convicted of infractions and misdemeanors. Cal. Penal Code § 1203(a); *City of Victorville v. County of San Bernardino*, 233 Cal. App. 3d 1312, 1319 (Ct. App. 1991).

"[s]ubmit his/her person, property, place of residence, vehicle, personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer." *Id.*

Below the listed conditions is a printed notice that reads as follows:

> UPON SATISFACTORY COMPLETION OF PROBATION YOU MAY APPLY TO THE COURT TO HAVE YOUR CONVICTION SET ASIDE PURSUANT TO SECTION 1203.4 OF THE PENAL CODE. I HAVE RECEIVED A COPY, READ AND UNDERSTAND THE ABOVE TERMS AND CONDITIONS AND AGREE TO ABIDE BY SAME.

Id. Below this notice the form provides a line for the defendant's signature, where Knights signed the order. Immediately below the signature line is written: "RECEIPT OF COPY ACKNOWLEDGED/DEF. SIGNATURE." *Id.* The record contains no indication of where or when Knights signed this Probation Order. The Probation Order was also executed by the court deputy and the sentencing judge. There is nothing in this record concerning any colloquy between the court and the defendant either before or after the sentence was imposed.

Relying on this search condition, the officers searched Knights' apartment for approximately 1½ hours. Record 128-29. As a result of the search, the officers seized, *inter alia*, detonation cord, ammunition, instruction manuals on chemistry, bottles with unknown

liquids, tools, a pair of pole-climbing spurs, drug paraphernalia, and a brass padlock stamped "PG&E." J.A. 17; Pet. App. 5a. Following the search, Knights was arrested.[4]

Based on the results of the search of his apartment, Knights was charged in Napa County Superior Court with receipt of stolen property, possession of a smoking device, possession of ammunition, possession of a destructive device and possession of ingredients to make a destructive device. J.A. 17-18. Nine months later, federal authorities intervened and the case was re-filed in federal court. *Id.* at 1.

Knights moved to suppress all evidence seized during the warrantless search of his apartment on grounds that the search conducted by state officers was not valid under federal law. J.A. 2. Knights argued that the search was not a valid probation search but rather had been styled as such by law enforcement as a means of evading the Fourth Amendment's warrant requirement. The government argued several different theories in response, among them the contention that Knights had consented to the search through a waiver of Fourth Amendment rights as a condition of probation. Pet. App. 24a.

After an evidentiary hearing, the district court granted Knights' motion to suppress all evidence seized in the June 3, 1998, search. *Id.* at 37a. The court ruled that

[4] Later that same day, Detective Hancock swore out an affidavit for a search warrant to search the co-defendant's truck. J.A. 43-49. The warrant was issued and the truck was searched the same day. Pet. App. 4a.

acceptance of a probation search condition does not eliminate all of a probationer's Fourth Amendment rights. *Id.* at 24a-26a. Relying on "longstanding clearly delineated case law in the Ninth Circuit regarding the standard governing probation searches," the district court concluded that the warrantless search of Knights' apartment violated the Fourth Amendment because it was an investigatory search, not a valid probation search. *Id.* at 31a-35a, 37a. To determine whether or not the search was undertaken to advance the goals of probation, rather than to further an independent criminal investigation, the court examined the record of events leading up to the search. Based on the factual record, the court found that

> the weight of the objective evidence supports a finding that a search here was undertaken for purposes of fostering the investigation of Mr. Knights' involvement in the possession and manufacture of incendiary devices primary [sic] to obtain evidence toward a criminal investigation for arson or manufacture of those same incendiary devices.

Id. at 33a.

The Court of Appeals for the Ninth Circuit affirmed. The court acknowledged that an individual may consent to a search. Noting that Knights here did consent, the court held that this consent "must be seen as limited to probation searches, and must stop short of investigation searches." Pet. App. 7a-8a. The court echoed the district court's conclusion that this warrantless search was unconstitutional because it was indisputably an investigatory search, conducted by law enforcement as part of an ongoing criminal investigation. The court considered,

and rejected, the government's contention that the decision in *Whren v. United States*, 517 U.S. 806 (1996), undermined Ninth Circuit precedents. The court noted that, in *Whren*, this Court had held that an officer's subjective intentions will not invalidate a search supported by probable cause; the ruling did not address a search for which there was no probable cause but only the probationer's consent to a search condition. Pet. App. 11a. In response to the government's expressed concern about a discrepancy between state and federal law, the court declined to modify federal law to accommodate California, noting that "[f]or at least three decades, it has been the law of this circuit that subterfuge probation searches are unconstitutional." *Id.* at 12a-13a.

SUMMARY OF ARGUMENT

Petitioner contends that Mr. Knights consented to the search of his home when he signed a court order confirming his acceptance of a search condition that he was *required* to accept as part of his probation. Petitioner contends that a search conducted pursuant to such a required consent falls within the consent exception to the Fourth Amendment and that, as long as Knights' consent was voluntary, the only constitutional constraint on a probation search condition is whether the condition falls afoul of the unconstitutional conditions doctrine.

Apart from true consent searches and situations presenting exigent circumstances, this Court has permitted warrantless incursions into constitutionally protected privacy rights only to the extent that there are "exceptional

circumstances" in which the "special needs" of a particular state program make strict adherence to the warrant and probable cause requirements impracticable. *Ferguson v. City of Charleston*, 121 S. Ct. 1281, 1287 n.7 (2001). Over many years, this Court has carefully constructed a "special needs" doctrine which gives the government significant latitude to conduct searches that would otherwise be impermissible under the Fourth Amendment. In each case where a legitimate special need arises, the Court has applied a balancing approach which allows limited departures from the Fourth Amendment to further important state interests. Consistently, however, this Court has "draw[n] the line" at efforts to invoke the special needs doctrine to legitimize warrantless searches which are not designed to further any special need beyond the normal needs of law enforcement. *City of Indianapolis v. Edmond*, 531 U.S. 32, 42 (2000).

In *Griffin v. Wisconsin*, 483 U.S. 868 (1987), this Court addressed the circumstances under which a warrantless probation search would be tolerated. The *Griffin* Court recognized that supervision of probationers presents a "special need," beyond the normal need for law enforcement, which justifies some departure from the warrant and probable cause requirements. The *Griffin* Court clearly held, however, that the permissible degree of impingement on a probationer's Fourth Amendment rights "is not unlimited." *Id.* at 875; *see also id.* at 873 ("A probationer's home, like anyone else's, is protected by the Fourth Amendment's requirement that searches be 'reasonable.' "). Rather, *Griffin* identified several important limitations designed to ensure that Fourth Amendment protections would be suspended only to the extent

necessary to accommodate the legitimate needs of the probation system.

The *Griffin* decision has been widely followed by both federal and state courts, which have consistently resolved the tension between the needs of a state's probation system and the individual's Fourth Amendment rights in accordance with the "special needs" balancing approach. The majority of state courts and virtually all of the federal courts of appeal rely upon the *Griffin* distinction between probationary searches, which may be performed without a warrant or probable cause, and regular investigatory searches, which may not.

California's blanket search condition is plainly unconstitutional under *Griffin* because it purports to suspend Fourth Amendment requirements for any searches by any law enforcement officer, even those that are not in furtherance of the special needs of the probation system. Petitioner seeks to avoid application of the *Griffin* limits on the theory that the search was lawful under the consent exception because Knights was required to consent to a search condition in order to receive probation.

Acceptance of this proposed theory of "required consent" would destroy the special needs doctrine. "Special needs" exceptions frequently arise in situations, such as this, where the state seeks to condition a certain benefit or privilege upon the individual's agreement to waive Fourth Amendment rights. *See, e.g., Chandler v. Miller*, 520 U.S. 305 (1997) (individuals seeking elected office); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (students seeking to participate in extracurricular sports). In each case where the required waiver is a condition of receiving

a benefit, only those individuals who consent to the condition are subject to search and thus any search would arguably be "consensual." That, however, has never precluded this Court's review of the fundamental question whether the proposed condition reflects a reasonable accommodation of the state's legitimate interests and the individual's constitutional rights.

Were this Court now to hold that required consent to a probation search condition constitutes an enforceable consent to search and forecloses further judicial scrutiny of the condition, the *Griffin* "special needs" doctrine would be obsolete. By the same logic, this "required consent" theory would render irrelevant this Court's special needs jurisprudence in other areas of Fourth Amendment analysis, such as business inspections, home inspections, automobile searches, and drug testing. The state, if not the court, would be free to impose upon aspiring politicians, student athletes, welfare recipients, indigent mothers, automobile drivers, and others the very same conditions that this Court has found to violate fundamental constitutional rights. The only limit the government acknowledges on the state's power under such a "consent" approach – the doctrine of "unconstitutional conditions" – is not ordinarily applied to resolve Fourth Amendment issues. To the extent it is applied in this context, Knights contends that it would require the court to conduct the same balancing that has long been part of the special needs doctrine.

Moreover, as is obvious from closer examination of the jurisprudence underlying "consent" searches, petitioner's required consent to probation conditions in no

way resembles the type of consent previously found sufficient to legitimize an otherwise unconstitutional warrantless search under the consent exception. No precedents support the validity of an unlimited advance waiver of all privacy rights in the home and person. Any such waiver, if it were enforceable, would have to be both knowing and voluntary, judged under the *Ferguson* standard, not the standard *Schneckloth v. Bustamonte* approved for officers conducting a search in the field. 412 U.S. 218 (1973). An agreement to a probation search condition waiving Fourth Amendment rights is not knowing where, as here, the defendant is not informed of his right to refuse consent. Nor was Knights' agreement to abide by his probation conditions a voluntary consent; under the circumstances, it was but acquiescence to the court's show of lawful authority. Finally, even if Petitioner could establish that Knights made a knowing and voluntary waiver of his Fourth Amendment rights in exchange for the grant of probation, the search condition's blanket waiver of rights constitutes an unconstitutional condition. In the Fourth Amendment context, the inquiry under unconstitutional conditions would mirror the inquiry the Court currently performs under the "special needs" analysis and would thus confirm that the instant probation condition is, indeed, unconstitutional.

The dramatic step urged by petitioner is unwarranted and unwise. In *Griffin*, this Court concluded that a state's compelling interest in the operation of its probation system is adequately accommodated by a limited search authority which permits probationary searches, but not regular police searches. Because the search at issue in this case was performed by law enforcement for

law enforcement purposes, not as part of any probationary scheme, it was not a lawful probation search.

ARGUMENT

I. THE CONSTITUTIONALITY OF RESTRICTIONS ON A PROBATIONER'S FOURTH AMENDMENT RIGHTS IS ASSESSED THROUGH A BALANCING OF THE INDIVIDUAL'S PRIVACY RIGHTS AND THE SPECIAL NEEDS OF THE STATE'S PROBATION SYSTEM, NOT BY THE PRESENCE OR ABSENCE OF A REQUIRED CONSENT

A. California's Blanket Search Condition Is Unconstitutional Because this Court Has Already Determined That the Special Needs of a State's Probation System Are Sufficiently Accommodated by a Limited Exception to the Fourth Amendment

This Court addressed the issue of warrantless probation searches in *Griffin v. Wisconsin*, 483 U.S. 868 (1987). The *Griffin* Court observed that "probation has become an increasingly common sentence for those convicted of serious crimes." *Id.* at 875. Relying on *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972), the Court noted that all probationers enjoy only a "conditional liberty" dependent upon compliance with special restrictions. *Id.* at 874. As the Court had recognized in *Morrissey*, however, even this conditional liberty "includes many of the core values of unqualified liberty." *Morrissey*, 408 U.S. at 482.[5]

[5] Earlier decisions had declined to apply constitutional procedural protections to probationers or parolees on the theory

Griffin identified the twin goals of probation – rehabilitation of the defendant and protection of the community – and concluded that these goals "require and justify" the exercise of supervision over probationers. 483 U.S. at 875. Requiring a probation officer to obtain a warrant, based on probable cause, before any search would interfere with the probation officer's need to make frequent visits and would undermine the special supervisory relationship between the probation officer and his

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that probation or parole was as "an act of grace" which could be "coupled with such conditions . . . as Congress may impose." *See, e.g., Escoe v. Zerbst*, 295 U.S. 490, 492-93 (1935). In *Morrissey v. Brewer*, 408 U.S. 471 (1972), the Court rejected this approach, concluding that "[i]t is hardly useful any longer to try to deal with this problem in terms of whether the parolee's liberty is a 'right' or a 'privilege.' " *Id.* at 482 (addressing procedural protections due parolees); *see also Gagnon v. Scarpelli*, 411 U.S. 778, 782 n.4 (1973) ("It is clear . . . that a probationer can no longer be denied due process, in reliance on the dictum in *Escoe v. Zerbst* that probation is an 'act of grace.' ") (citation omitted).

Rejection of the "privilege" approach came with the recognition that, even thirty years ago, probation had become an integral part of the criminal justice system:

> "A fundamental problem with (the right-privilege theory) is that probation is now the most frequent penal disposition . . . [and] an integral part of the criminal justice process. . . . Seen in this light, the question becomes whether legal safeguards should be provided for hundreds of thousands of individuals who daily are processed and regulated by governmental agencies." F. Cohen, *The Legal Challenge to Corrections: Implications for Manpower and Training* 32 (Joint Commission on Correctional Manpower & Training 1969).

Morrissey, 408 U.S. at 493 n.3 (Douglas, J., dissenting in part).

"client." *Id.* at 876, 879. This Court therefore concluded that the state's operation of a probation system, "like its operation of a school, government office or prison, or its supervision of a regulated industry, likewise presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements." *Id.* at 873-74.

Under the special needs doctrine, after first identifying the "special need," the Court assesses the lawfulness of the warrantless search by "balancing the need to search against the invasion which the search entails." *See Camara v. Municipal Court*, 387 U.S. 523, 536-37 (1967). *See also Ferguson*, 121 S. Ct. at 1288 (special needs balancing test requires "weighing the intrusion on the individual's privacy interest against the 'special needs' that supported the program"); *Skinner v. Railway Labor Execs. Ass'n*, 489 U.S. 602, 619 (1989) (reasonableness of particular practice " 'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests' ") (quoting *Delaware v. Prouse*, 440 U.S. 648, 654 (1979)). The *Griffin* Court's conclusion that the search reflected a permissible balance under the Fourth Amendment relied upon three central findings: First, the search was by a probation officer, not a police officer, and was not conducted for normal law enforcement purposes. *Griffin*, 483 U.S. at 871, 876. Second, the search was based upon reasonable suspicion of criminal activity. *Id.* at 878. Third, the warrantless search was reasonable because it was conducted pursuant to a regulation which constrained the discretion of the probation officer and was itself constitutional, in that it reflected a permissible balancing of the special need of

the probation system for supervision in order to further the probationer's rehabilitation and the public's safety against the probationer's reasonable expectation of privacy. *Id.* at 873-875, 880; *see also id.* at 875 (degree to which state may permissibly impinge on probationer's privacy is "not unlimited").

Petitioner suggests that *Griffin* did not establish "a constitutional floor." Brief for Pet. 20 n.11. While it is true that courts applying *Griffin* have not required every state to enact regulations mirroring Wisconsin's, *Griffin* necessarily requires that the warrantless search be a *probation* search, not an investigatory search conducted to further law enforcement interests. This basic distinction between a lawful special needs search and a search conducted primarily for the general needs of law enforcement serves as the constitutional floor not simply in *Griffin* but in every special needs case. *See, e.g., Edmond*, 531 U.S. at 42 (Fourth Amendment requires that Court "draw[ ] the line" at roadblocks designed primarily to serve the general interest in crime control).

Petitioner further asserts that *Griffin* "did not consider whether a person offered probation could validly consent to searches without individualized suspicion [or searches by a broader category of law enforcement officers] as a condition of release." Brief for Pet. 20 n.11 & 28 n.15. It is true that *Griffin* says nothing about a probationer's ability to give a truly voluntary consent to any search, but that is not at issue here. Petitioner urges that a state may *require* a defendant to submit to warrantless, suspicionless searches by law enforcement in order to receive probation. *Griffin* does limit what a court may require because the Court's ruling addresses what the

Fourth Amendment permits. A sentencing court is bound to respect the constitutional limits on its sentencing authority.

The District Court and the Court of Appeals applied the *Griffin* analysis and concluded, correctly, that this search was not a lawful probation search. The search condition imposed upon Knights purports to authorize any law enforcement officer to conduct an investigatory search at any time, for any reason. This search was conducted by law enforcement as part of an ongoing criminal investigation. Under *Griffin*, the search condition is overbroad and the warrantless search was unconstitutional.

B. Across the Country, the Constitutionality of Probation Searches Is Assessed under the *Griffin* "Special Needs" Approach

In the wake of *Griffin*, the federal courts – and the majority of state courts – have relied upon this Court's analysis of the special needs balance to resolve the tension between the needs of a state's probation system and the individual's Fourth Amendment rights. Thus, while the federal courts of appeal generally have not read *Griffin* to preclude the use of police in the execution of probation searches, they have adhered to *Griffin*'s fundamental requirement that the search be for probation purposes. *See United States v. Giannetta*, 909 F.2d 571, 581 (1st Cir. 1990) (search must be for probationary purpose; probation officer may not be used by police to circumvent the Fourth Amendment's warrant requirement); *United States v. Polito*, 583 F.2d 48, 53 n.6 (2d Cir. 1978)

(warrantless probation search may be unlawful if used by police as subterfuge for criminal investigation); *Shea v. Smith*, 966 F.2d 127, 132-33 (3d Cir. 1992) (police may not use probation officer as stalking horse); *United States v. Martin*, 25 F.3d 293, 296 (6th Cir. 1994) (probation search may not serve as subterfuge for criminal investigation; search upheld where no evidence that probation officer was used to help police evade the warrant requirement); *United States v. Coleman*, 22 F.3d 126, 129 (7th Cir. 1994) (police may not use probation search condition to evade warrant requirement); *United States v. McFarland*, 116 F.3d 316, 318 (8th Cir. 1997) (parole officer may not serve as "stalking horse" for the police); *United States v. Ooley*, 116 F.3d 370, 372 (9th Cir. 1997); *United States v. McCarty*, 82 F.3d 943, 947 (10th Cir. 1996) (police may not use probation officer to evade Fourth Amendment warrant requirement). These decisions make clear that the special needs exception to the warrant and probable cause requirement is restricted to special needs searches; it "is not an open invitation to gamesmanship through which law enforcement personnel can circumvent the rigors of the Fourth Amendment." *United States v. Cardona*, 903 F.2d 60, 65-66 (1st Cir. 1990).

In addition, reflecting *Griffin*'s concern that the probation officer's discretion to search be limited by neutral criteria, several federal courts of appeal have held that the reasonableness of a special needs probation search depends on whether it complies with a regulation that is itself reasonable. *See, e.g., United States v. Conway*, 122 F.3d 841, 844 (9th Cir. 1997) (Wallace, J., concurring in the result); *United States v. Cantley*, 130 F.3d 1371, 1375 (10th Cir. 1997). Alternatively, some federal appellate courts

have held that, in the absence of a regulation, Fourth Amendment reasonableness may be satisfied if the record demonstrates that the court narrowly tailored a probation search condition to the individual probationer's circumstances. *See, e.g., Giannetta*, 909 F.2d at 575-76. A custom-tailored search condition, like a probation regulation, serves to limit the probation officer's exercise of discretion in conducting a warrantless search, as *Griffin* requires. *Id.* at 575.

Regardless of the variations in the particular tests applied, the federal courts that have considered this issue are unanimous in their view that police conducting a criminal investigation may not use a probation search condition as subterfuge for avoiding the Fourth Amendment's warrant requirement. *See, e.g. Giannetta*, 909 F.2d at 581; *United States v. Hill*, 967 F.2d 902, 911 (3d Cir. 1992) (parole officer's search authority stems from the parole system's "special needs"; search upheld where no evidence that parole agents acted on behalf of the police); *Martin*, 25 F.3d at 296; *Coleman*, 22 F.3d at 129; *McFarland*, 116 F.3d at 318; *Cantley*, 130 F.3d at 1376.

Among state courts, California's Supreme Court is out of the mainstream.[6] The majority of state courts

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[6] The blanket waiver required of probationers in California is a creature of the courts, not the legislature. The California legislature has not enacted any statute requiring all probationers to submit to unlimited searches as a condition of probation. The only legislative guidance relating to probation search conditions is the requirement that any probation condition be "reasonable" and further the goals of reparation and rehabilitation. *See* Cal. Penal Code § 1203.1(j); *compare* Cal. Penal Code § 1000.12(c)(1) & (c)(4)(D) (under deferred entry of

distinguish between probation searches and law enforcement searches and will invalidate a warrantless probation search when it is conducted by law enforcement as a subterfuge for avoiding Fourth Amendment requirements.[7]

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judgment provision applicable in child abuse and neglect prosecutions, statute expressly requires defendant to submit to search by any law enforcement officer).

[7] *See, e.g., Roman v. State*, 570 P.2d 1235, 1242 n.20 (Alaska 1977) (search condition must be limited to "authorize searches only by correctional authorities or peace officers acting under their direction"); *State v. Hill*, 666 P.2d 92, 94 (Ariz. Ct. App. 1983) ("it is impermissible for police to use probation officers as a pretext for conducting a criminal investigation"); *People v. Slusher*, 844 P.2d 1222, 1225 (Colo. 1992) ("[t]he fact that a person is on parole does not justify a search without a warrant by any law enforcement officer other than a parole officer"); *State v. Whitfield*, 599 A.2d 21, 24 (Conn. App. Ct. 1991) (ability to search parolee without probable cause does not extend to law enforcement officers); *State v. Harris*, 734 A.2d 629, 634 (Del. 1998) (probation searches "should never be made solely on the basis of a request from law enforcement officials"); *Llanos v. State*, 401 So. 2d 848, 849 (Fla. Dist. Ct. App. 1981) (search condition requiring probationer to "submit to a search at any time by any law enforcement officer" is invalid); *State v. Propios*, 879 P.2d 1057, 1060 (Haw. 1994) (probation search must not be subterfuge for criminal investigation); *People v. Eiland*, 576 N.E.2d 1185, 1192 (Ill. App. Ct. 1991) (distinguishing between a search made for probation purposes and a search conducted by law enforcement officers); *Polk v. State*, 739 N.E.2d 666, 669 (Ind. Ct. App. 2000) ("affording probationers lesser protections is predicated on the premise that probation officers, or police working with probation officers, are conducting searches connected to the enforcement of conditions of probation and not for normal law enforcement purposes"); *State v. Cullison*, 173 N.W.2d 533 (Iowa 1970); *State v. Thomas*, 683 So. 2d 885, 886 (La. Ct. App. 1996) ("a probationer is not subject to the unrestrained

C. There Is a Clear and Workable Distinction Between Probation Searches and Investigatory Searches; Investigatory Searches Are Not Part of Any State's Probation System

Petitioner complains that the distinction between probation searches and investigative searches is unsound because police searches serve to discover whether a probationer is in compliance with the basic requirement that he "refrain from committing further crimes." Brief for Pet. 27. Conceding that the primary purpose of the search in this case was to investigate crime, Petitioner argues that the warrantless search should nonetheless be upheld because it also serves a secondary purpose of assisting the probation department to monitor probationers. *Id.* (search serves probationary purpose "even though" actual purpose is general crime control).[8]

Petitioner's argument fails because it is fundamentally incompatible with the special needs theory. If probation officers, like the police, cared exclusively for crime control and protection of the public, probation searches would not fall within the special needs exception. It is only the twin goals of probation – fostering the probationer's rehabilitation *and* protecting the public – that

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power of the authorities; a search of a probationer may not be a subterfuge for a police investigation"); *Commonwealth v. LaFrance*, 525 N.E.2d 379, 382 n.5 (Mass. 1988) ("police may not properly use the probation office as a subterfuge to conduct a search of a probationer or her premises").

[8] This assertion is itself suspect; the research suggests that Petitioner overstates the value of random police searches in furthering the goals of probation. *See* p. 22 & n.9, *infra*.

distinguish probation officers from regular law enforcement officers and justify treating probation supervision as a special need, beyond the normal need for law enforcement. The fact that law enforcement officers may indirectly further a probation goal does not change this basic distinction. *See, e.g., Edmond*, 531 U.S. at 46-47 (where primary purpose is crime control, lawful secondary purpose insufficient to bring warrantless, suspicionless searches within special needs exception).

Petitioner further objects to the distinction between probation and investigatory searches on grounds that it requires an inquiry into purpose incompatible with consent-search precedents and this Court's decision in *Whren v. United States*, 517 U.S. 806 (1996). Because the lawfulness of a warrantless probation search is assessed under the special needs doctrine, however, an inquiry into purpose is essential. *Whren* is not to the contrary.

In *Whren*, this Court held that a search based upon adequate probable cause could not be deemed unreasonable because of the officer's ulterior motives, because "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." *Whren*, 517 U.S. at 813. The Court explicitly distinguished cases which addressed the validity of searches conducted in the *absence* of probable cause. *Id.* at 811.

Subsequently, in *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), the Court invalidated Indianapolis's drug interdiction highway checkpoint program, explaining: "We decline to suspend the usual requirement of individualized suspicion where the police seek to employ a

checkpoint primarily for the ordinary enterprise of investigating crimes." *Id.* at 44. Indianapolis argued unsuccessfully that *Whren* prohibited any inquiry into the purpose of the checkpoint program. This Court observed that "our cases dealing with intrusions that occur pursuant to a general scheme absent individualized suspicion have often required an inquiry into purpose at the programmatic level," and concluded that "*Whren* does not preclude an inquiry into programmatic purpose in such contexts." *Id.* at 46.

Similarly, in *Ferguson*, the Court conducted a "close review" of "all the available evidence" to determine whether the primary purpose of a program of suspicionless searches was to further a legitimate special need distinct from the general interest in crime control. 121 S. Ct. at 1290. Although the state argued that the program requiring drug testing of patients seeking prenatal care had, as its ultimate purpose, the "beneficent" motive of protecting maternal and fetal health, the Court's examination of the record disclosed that "the primary purpose of the Charleston program . . . was to use the threat of arrest and prosecution in order to force women into treatment." *Id.* at 1292. The objective of the searches was "to generate evidence *for law enforcement purposes*." *Id.* at 1291 (emphasis in the original). Given the "extensive involvement of law enforcement," the Court concluded, the program "simply does not fit within the closely guarded category of 'special needs.' " *Id.* at 1292.

In the instant case, the purported connection to the goals of the probation department – i.e., that "the threat of [police searches]" will "force" probationers to obey the law – is no different than the law enforcement purpose

found impermissible in *Ferguson*. *See id.* at 1292. Significantly, this search was not even nominally part of an established probation program; the only program in evidence is the *de facto* program operated by the Napa County Sheriff's Department, which maintains records of probationers in order to facilitate the Department's own searches. Thus the district court and court of appeals correctly determined that the primary purpose of the search was to further a police investigation and that such an investigatory search is not a lawful probation search under the special needs doctrine.

Amici's criticisms of the distinction between law enforcement searches and probation searches are no more persuasive. The State of California's argument that probationers' rehabilitation is dependent on warrantless investigatory searches echoes the "extensive entanglement" problem this Court identified in *Ferguson*. *See id.* at 1292 n.20. Moreover, California provides no evidence to support the assertion that unprovoked searches by police deter crime. In fact, researchers have found no evidence that increased surveillance of probationers is effective in reducing recidivism.[9]

Amicus Center for the Community Interest ("CCI") asserts that "[c]ommunity supervision programs utilizing

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[9] *See, e.g.*, Joan Petersilia, *A Decade of Experimenting With Intermediate Sanctions: What Have We Learned?*, 62 Federal Probation 3, 6 (Dec. 1998). Conversely, researchers have consistently found that rehabilitation is a key component of effective probation supervision. *See, e.g., id.* at 6 (participation in treatment, community service, and employment programs reduces recidivism rates).

warrantless, suspicionless searches, notably in the city of Boston, Massachusetts, have been extremely successful in reducing recidivism and deterring crime." Brief of CCI 3. Quite to the contrary, however, the Boston program does not utilize warrantless investigatory searches by police officers nor, does it appear, do any of the other programs cited in CCI's brief.[10] *See id.* at 16 n.42. Although *amicus* Criminal Justice Legal Foundation ("CJLF") asserts that allowing police to conduct warrantless searches of probationers for law enforcement purposes is a "key component of many probation systems," Brief of CJLF 2, CJLF identifies not a single probation system outside of California that utilizes such searches.

D. Petitioner's Contention that Acceptance of Probation Conditions Falls Within the "Consent" Exception, If Accepted, Would Result in the Destruction of the Special Needs Doctrine

Petitioner contends that a probationer may consent to a more substantial waiver of Fourth Amendment rights than may be involuntarily imposed upon him. Petitioner relies on prior rulings of this Court, primarily *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), upholding the constitutionality of consent searches. As discussed more extensively below, none of the cases cited by Petitioner endorse

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[10] *See* Dale Parent & Brad Snyder, *Police-Corrections Partnerships*, 1999 Issues and Practices in Criminal Justice 11-13 (publication of the U.S. Dept. of Justice, National Inst. of Justice); *see also* James T. Jordan, *Boston's Operation Night Light: New Roles, New Rules*, 67 FBI Law Enforcement Bull. 1 (Aug. 1, 1998). In fact, Massachusetts law requires even probation officers to obtain a search warrant. *See LaFrance*, 525 N.E.2d at 382-83.

the type of unlimited "advance consent" at issue here, *see infra* at 36-40. In addition, however, Petitioner's argument is mistaken because it ignores the fact that many, if not all, warrantless searches resolved under the "special needs" framework involve some type of "consent," either explicit or implicit. *See Ferguson*, 121 S. Ct. at 1295 (Kennedy, J., concurring) ("an essential, distinguishing feature of the special needs cases is that the person searched has consented" to the search).

In *Vernonia School District 47J v. Acton*, 515 U.S. 646, 650 (1995), for example, the challenged drug testing only affected those students who chose to play sports; prior to any testing, those students were required "[to] sign a form consenting to the testing and [to] obtain the written consent of their parents." In *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 660, 664 (1989), Customs Service employees challenged a policy which required applicants for certain positions to submit to drug tests; the Court applied the special needs analysis to determine whether this " 'exaction of consent as a condition of assignment to [a] new job' " was reasonable under the Fourth Amendment. In *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 610-11 (1989), railroad employees faced the choice either to consent to drug testing or, if they declined, to be temporarily withdrawn from the covered position. In *Chandler v. Miller*, 520 U.S. 305, 308 (1997), the challenged statute required candidates for designated state offices to submit to a drug test as a condition of seeking office; the fact that any candidate could avoid the drug test by not running for office did not deter this Court from reviewing the condition and concluding it violated the Fourth Amendment.

In each of those cases, only those individuals who "consented" in order to participate in the particular program, employment, or business, would be subject to the challenged search. Notwithstanding this fact, the Court in each case scrutinized the nature of the government interest and the degree of the intrusion into the individual's privacy to determine whether the search was reasonable. *See also United States v. Biswell*, 406 U.S. 311, 315 (1972) (where business owner consents to inspection, the lawfulness of the search does not depend on consent; "In the context of a regulatory inspection system of business premises that is carefully limited in time, place, and scope, the legality of the search depends not on consent but on the authority of a valid statute.").

Not only is consent in such cases a "manifest fiction," *People v. Mason*, 488 P.2d 630, 636 (Cal. 1971) (Peters, J., dissenting), *disapproved on other grounds, People v. Lent*, 541 P.2d 545 (Cal. 1975), it fails to provide any meaningful check on unreasonable government intrusions. If the fictive consent extracted under these circumstances were deemed sufficient to make a search "reasonable" under the Fourth Amendment, all further analysis would become moot. Abandonment of the "special needs" analysis in favor of Petitioner's consent theory would empower the government to dispense with the protections of the Fourth Amendment on a broad scale by requiring the surrender of constitutional rights as a prerequisite to a host of government benefits. If a probationer like Mark Knights may be required to give advance consent to a complete waiver of Fourth Amendment rights in order to be considered for probation, what would prevent the government from requiring applicants

for driver's licenses to give advance consent to suspicionless stops or searches of their cars, candidates for public office to give advance consent to searches of their offices or bodies, welfare recipients to give advance consent to full searches of their homes, or any licensed business to agree to any type of search or seizure of its premises? Under Petitioner's consent theory, the state's power to extract such waivers would be unlimited and removed from any judicial review, constrained, if at all, only by the "unconstitutional conditions" doctrine.

II. KNIGHTS' REQUIRED CONSENT TO THE PROBATION SEARCH CONDITION DOES NOT CONSTITUTE A VALID CONSENT TO THE SEARCH OF HIS HOME

Petitioner contends that Knights faced a choice between probation with a search condition, or jail, that he chose probation, and that he therefore voluntarily consented to be subject to the unlimited searches described in the probation condition. Petitioner proposes that, under such a consent analysis, the only questions for the Court would be: (1) whether Knights' consent to search was voluntary; and (2) whether the search was within the scope of his consent. Petitioner proposes that the only further limits upon the state's ability to exact concessions from a defendant are found in the doctrine of "unconstitutional conditions": even if a valid consent were obtained, did the state exceed its lawful authority by conditioning probation upon a waiver of all Fourth Amendment rights?

Knights has argued in Part I, above, that this search condition exceeds the scope of a valid probation search and that the sentencing court could not require him to accept an unconstitutionally broad search condition in order to receive probation. Knights contends, however, that even under the consent analysis proposed by Petitioner, this search was unlawful.

Petitioner's consent argument is premised upon the view that probation is a privilege, not a right, which may be subject to conditions at the court's discretion. This view was espoused by the California Supreme Court in 1971, shortly before the *Morrissey* decision issued, and has survived to this day. Although similar blanket waivers have been upheld by the California Supreme Court under a consent theory, the California Supreme Court has never presented a satisfying explanation of the way in which the consent doctrine, as expounded by this Court, could function in the context of a forced, advance consent. Over time, the flaws in this approach – including the extreme results to which it leads – have become apparent.[11]

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[11] Four of the seven justices on the California Supreme Court have recently questioned the coherence of the court's approach to probation search conditions and have challenged the construction of a probationer's consent to a search condition as a blanket waiver of Fourth Amendment rights. *See People v. Reyes*, 968 P.2d 445, 453-62 (Cal. 1998) (Kennard, Mosk, & Werdegar, JJ., concurring and dissenting); *People v. Woods*, 981 P.2d 1019, 1029-38 (Cal. 1999) (Brown, Kennard, & Mosk, JJ., dissenting). Three justices have specifically questioned the continued vitality of the "consent" rationale as the basis for warrantless searches of a probationer. *Woods*, 981 P.2d at 1031 (Brown, Kennard, & Mosk, JJ., dissenting) (noting that "the

The errors in California's jurisprudence can be traced almost entirely to the California Supreme Court's 1971 decision in *People v. Mason*, 488 P.2d 630 (Cal. 1971). The *Mason* majority held for the first time that a search condition requiring a probationer to submit to warrantless searches by any law enforcement agent was enforceable under the consent exception to the Fourth Amendment. The only precedent identified as support for the validity of an advance consent – in *Mason* as in all subsequent rulings from the California courts – was *Zap v. United States*, 328 U.S. 624 (1946), a business records inspection case.

Justice Peters, dissenting from the *Mason* majority, identified the same flaws that persist to this day. He noted that the majority's view of probation as "a matter of grace or privilege" had been replaced by recognition that limits applied when the state sought to condition a benefit on the waiver of constitutional rights. 488 P.2d at 635. He further observed that the majority had "turned their back" on established case law recognizing the Fourth Amendment rights of probationers and parolees, and had instead relied on "the manifest fiction that a probationer 'consents' to the condition of his relief." *Id.* at 636.

California courts continued to uphold the validity of blanket search conditions even after this Court's decision

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consent theory articulated in *People v. Bravo* may be largely moot in light of *People v. Reyes*," which had applied administrative necessity rationale to parolees rather than a consent analysis) (citations omitted).

in *Griffin*. The California Supreme Court at first distinguished *Griffin* on the theory that it applied only to searches conducted pursuant to regulations, not conditions imposed by "consent." *People v. Bravo*, 738 P.2d 336, 341 (Cal. 1987). Subsequently, forced to confront the constitutional limits on search conditions imposed on juveniles – who cannot be said to "consent" to their mandatory supervision – the court again declined to follow *Griffin*. *In re Tyrell J.*, 876 P.2d 519, 531-32 (Cal. 1994) (police may rely on a probation search condition of which they are unaware to justify an otherwise illegal search of probationer). Dissenting from the majority in *Tyrell J.*, Justice Kennard observed that the court's ruling was "contrary to the unanimous views of the federal bench, the courts of other states, the legal commentators that have addressed this issue, and this court's own decisions." *Id.* at 538. *See also id.* at 537 ("A policy more at odds with the purpose underlying the Fourth Amendment would be difficult to imagine.").

To the extent this Court chooses to address the consent approach, however, Knights respectfully submits that the instant search fails to meet the requirements of a valid consent. First, where the consent is to future searches, the burden on the government must be to show that Knights' waiver of rights was both knowing and voluntary. *See Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938); *Ferguson*, 121 S. Ct. at 1292. Knights' consent to the probation search condition here satisfies neither prong. Second, even if a proper waiver had been obtained, the condition is unenforceable because it presents an unconstitutional condition. Although this doctrine is not commonly applied in the Fourth Amendment context, it calls

for a balancing test that, in this context, necessarily returns the Court to a test similar to the balancing required by a special needs analysis. Here, the condition is unconstitutional because the intrusion suffered by the probationer who loses all Fourth Amendment rights to the privacy of his person and his home far exceeds the intrusion necessary to achieve the State's legitimate goals of operating its probation system.

A. Knights' Agreement to Consent to Future Probation Searches Was Not a Forfeiture but a Waiver of Rights Which to Be Effective Must Have Been Knowing as Well as Voluntary

Petitioner suggests that the only test necessary for assessing the validity of a probationer's prospective waiver of Fourth Amendment rights is whether the waiver was "voluntar[y]." *See* Brief for Pet. 18 n.9. In *Schneckloth*, 412 U.S. 218, this Court held that the Fourth Amendment protection against warrantless searches could be lost through a defendant's voluntary consent to search, even without knowledge of the right to decline. Yet while the *Schneckloth* decision speaks in terms of "waiver," the Court declined to apply the traditional requirements of waiver analysis. Reviewing the *Schneckloth* decision reveals that the Court, instead, approached the issue as a forfeiture of rights.

The rationale behind *Schneckloth* does not apply to a waiver obtained at sentencing. Furthermore, this Court's decision in *Ferguson* establishes that an agreement to waive Fourth Amendment rights that is obtained outside

the ordinary context of a police investigation must be a knowing and voluntary waiver.

The Court has recognized that "[w]aiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" *United States v. Olano*, 507 U.S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); other citations omitted); *see also Freytag v. Commissioner*, 501 U.S. 868, 894 n.2 (1991) (Scalia, J., concurring in part and concurring the judgment) (distinguishing between waiver and forfeiture). A right that may be forfeited can be lost through mere inadvertence or failure to act. Unlike waiver, forfeiture may occur without the bearer of the right even realizing the existence of that right. However, a right that requires waiver cannot be lost without such a knowing abandonment.[12]

In *Schneckloth v. Bustamonte*, 412 U.S. 218, 231 (1973), the Court declined to "impose on the normal consent search the detailed requirements of an effective warning," including articulation of the right to decline consent. The Court explained that its holding was necessary because "[i]t would be unrealistic to expect that in the informal,

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[12] Confusion arises because the Court has used the terms "waiver" and "forfeiture" interchangeably notwithstanding their distinct meanings. *See Freytag v. Commissioner*, 501 U.S. 868, 894 n.2 (1991) (Scalia, J., concurring in part and concurring in the judgment) (noting that the terms waiver and forfeiture "are really not the same, although our cases have so often used them interchangeably that it may be too late to introduce precision"). *See generally* Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide to Loss, Abandonment and Alienation*, 68 Fordham L. Rev. 2011, 2053-56 (2000).

unstructured context of a consent search, a policeman, upon pain of tainting the evidence obtained, could make the detailed type of examination demanded by *Johnson*." *Id.* at 245. The Court explicitly distinguished the standard it was applying to the normal consent search from the more detailed waiver inquiry prescribed in *Johnson v. Zerbst*, an inquiry "that was designed for a trial judge in the structured atmosphere of a courtroom," not for the officer in the field. *Id.* at 243-44.

Although the holding in *Schneckloth* does not address a formal agreement to relinquish Fourth Amendment rights in the future, the Court's reasoning strongly suggests that such an advance waiver, obtained by "a trial judge in the structured atmosphere of a courtroom," must comply with the *Johnson v. Zerbst* requirements. *Id.* There is no incongruity in the application of different standards depending on the context in which the right is lost; to the contrary, context frequently determines whether a right may be forfeited or must be waived. *Compare, e.g.*, Fed. R. App. P. 3 (right to appeal may be forfeited by failing to file a timely notice), *with United States v. Marin*, 961 F.2d 493, 496 (4th Cir. 1992) (advance promise in plea agreement not to file appeal must be knowing and voluntary waiver). Moreover, in a similar context, this Court has suggested that a "prospective waiver" of statutory protections would require a different standard than consent to an isolated incident. *See New York v. Hill*, 528 U.S. 110, 115 (2000) (evidence of defendant's consent to a single delay under the Interstate Agreement on Detainers sufficient because "this case *d*[*oes*] *not involve a purported prospective waiver of all protection* of the IAD's time limits or of the IAD generally, but merely agreement to a specified delay in trial") (emphasis added).

This Court's decision in *Ferguson* last term confirms that a consent to a search that exceeds the scope of a permissible "special needs" search requires a waiver that is both knowing and voluntary. 121 S. Ct. at 1292. In *Ferguson*, the Court found that the proposed search was not justified under the special needs doctrine but rather had as its primary purpose the collection of incriminating evidence against hospital patients. The Court therefore concluded that the standards of knowing waiver require that the patients be "fully informed about their constitutional rights" for any consent to be enforceable. *Id.* Although the Court did not repeat the standards for knowing waiver, it is apparent from the citation to *Miranda* that, at a minimum, the individual be informed of her right to decline consent.

The sentencing court required from Knights a prospective waiver of virtually all protections of the Fourth Amendment. Because what the court sought was the intentional relinquishment of the defendant's Fourth Amendment rights, the waiver had to be both knowing and voluntary.

B. Agreement to a Probation Search Condition Waiving Fourth Amendment Rights Is Not Knowing Where the Defendant Is Not Informed of His Right to Refuse Consent

The burden falls on the government to establish that Knights' waiver was valid and enforceable. *Schneckloth*, 412 U.S. at 222. Petitioner has relied on the *Schneckloth* standard and thus does not address whether Knights' waiver of his Fourth Amendment rights was knowing

and intelligent. *Cf.* Brief for Pet. 18 n.9. A review of the record establishes that Petitioner will be unable to meet this burden because there is no evidence in the record that Knights was ever informed that he could, if he chose, decline to waive his Fourth Amendment rights. *Compare Miranda v. Arizona*, 384 U.S. 436 (1966); *Ferguson*, 121 S. Ct. at 1292.

Petitioner concedes that Knights was required to agree to the search condition in order to receive probation. *See* Brief for Pet. 10 ("Respondent was *required*, as one of the conditions of his probation, to '[s]ubmit his * * * person, property,' " etc., to search at any time) (emphasis added; omission in original); *see also id.* at 23 (if probationer does not consent, "the alternative is incarceration"); *id.* at 28 (defending State's authority to "make release on probation contingent upon the probationer's voluntary consent to search[ ]"). The only evidence of Knights' agreement to the search condition or of his "consent" to be searched is a one-page document entitled "PROBATION *ORDER*." J.A. 50 (emphasis added). That order states that the defendant, having been convicted of a misdemeanor violation, "IS HEREBY *ORDERED*" to submit to several conditions, including warrantless searches. *Id.* (emphasis added). Knights placed his signature beneath a statement that he had received a copy of the order and agreed to abide by the terms and conditions of probation.

Petitioner contends that Knights had the option, if he did not agree with the probation condition, of going to prison. *See* Brief for Pet. 23-24. Regardless of whether this

is an accurate statement of current California law,[13] there is no evidence in the record that Knights was informed he had this option. There is similarly no indication in the record that Knights was informed that he could refuse to accept the search condition and still receive probation. Considering that the California courts have taken the position that a probationer may be *required* to "consent" to a blanket waiver of all Fourth Amendment rights in order to receive probation, it seems unlikely that Knights was informed of this option.

Under *Griffin*, of course, a probationer such as Knights may be required to endure certain intrusions into his Fourth Amendment rights whether he consents or not. *See supra* at 13-16. Thus, to provide Knights with an

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[13] This basic premise of petitioner's argument does not appear to be correct. Petitioner asserts that "[u]nder California law, a criminal defendant may not be compelled to accept probation." Brief for Pet. 17 (citing *People v. Mason*, 488 P.2d 630 (1972)). *Mason* cited no statutory support for this proposition but instead relied on earlier California Supreme Court precedents in which this conclusion was found to follow from the then-accepted view that the right of a defendant to refuse probation if accompanied by onerous conditions was a necessary safeguard because of the lack of any other limitations on the court's power to impose conditions. *Mason*, 488 P.2d at 632. Because probation is now recognized as an integral part of the criminal justice system, not an "act of grace," the continued vitality of this reasoning is questionable.

Moreover, even if this was an accurate statement of California law in 1972, it is no longer the law today. Under current California law, probation is now mandatory for first offenders convicted of a nonviolent drug possession offense. Cal. Penal Code § 1210.1(a). No "consent" theory may be applied to these probationers.

accurate advisement of rights, the court would have had to explain to him that while on probation he could, regardless of his consent, be subject to warrantless searches provided the searches were conducted for a probationary purpose. Thus the proper focus of the waiver would be on those remaining, diminished Fourth Amendment rights that a probationer retains under *Griffin*. An accurate advisement of rights would inform the probationer that he had a choice whether to waive these remaining rights, and that even if he declined to waive these rights he would still receive probation because the court could not require him to submit to greater intrusions than those necessary for the purposes of probation.

C. Knights' Agreement to Abide By His Probation Conditions Was Not Voluntary Consent but Acquiescence to a Show of Lawful Authority

The government " 'has the burden of proving that the consent was, in fact, freely and voluntarily given.' " *Schneckloth*, 412 U.S. at 222 (quoting *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968)). The Court considers "the totality of the surrounding circumstances" to determine whether the defendant has made an "essentially free and unconstrained choice." *Id.* at 225-26.

In support of the voluntariness of this consent, Petitioner relies upon three cases: *Schneckloth, Bumper v. North Carolina*, 391 U.S. 543 (1968), and *Zap v. United States*, 328 U.S. 624 (1946), *vacated on other grounds*, 330 U.S. 800 (1947). None support the voluntariness of this advance consent. Both *Schneckloth* and *Bumper* concerned specific,

contemporaneous searches conducted promptly upon the individual's agreement to the particular request to search; neither addressed the possibility of an "advance consent." In *Schneckloth*, the defendant literally consented to the search ("Sure, go ahead") and assisted the officer in its execution. 412 U.S. at 220. Thus, voluntariness was essentially undisputed; the question before this Court was whether under those circumstances the officer was required to inform the defendant of his right to refuse.

Bumper is more illuminating. The consent in *Bumper* was obtained by four officers who arrived at the home of the defendant's mother and informed her that they had a search warrant to search her house. In response, Mrs. Bumper permitted the officers to enter and conduct a search. Thus (paraphrased slightly), the question in *Bumper* was whether a search can be justified as lawful on the basis of consent when the consent has been given only after the official who obtains the consent has asserted that he possesses lawful authority to conduct the search regardless of consent. 391 U.S. at 548. This Court was clear: "there can be no consent under such circumstances." *Id.* Rather, the facts established no more than "acquiescence to a claim of lawful authority," which is not a voluntary consent. *Id.* at 548-49; *see also id.* at 549 n.14 ("One who, upon the command of an officer authorized to enter and search . . . [,] acquiesces in obedience to such a request, no matter by what language used in such acquiescence, is but showing a regard for the supremacy of the law.") (internal citation and quotation marks omitted).

The record in this case establishes that the "consent" which underpins Petitioner's argument is nothing more

than Knights' signature on a "PROBATION ORDER." Following the words "[IT] IS HEREBY *ORDERED*," *id.* (emphasis added), the order sets forth the terms and conditions of probation, including the search condition. The form allows room for the defendant's signature following a brief paragraph that includes the statement: "I have received a copy, read and understand the above terms and conditions and agree to abide by same." J.A. at 50 (all capitals in original).

Under these circumstances, Mr. Knights' agreement to obey the court's order was just that: agreement to abide by what appeared to be a lawful court order. Nothing in the order suggests that compliance is optional. Knights had no reason to suspect that the order exceeded the scope of the court's lawful authority. Even if he had harbored suspicions about the lawfulness of the search condition, these would not have provided a legal basis for Knights to refuse to abide by its terms. *Walker v. City of Birmingham*, 388 U.S. 307, 320 (1967) (doubts regarding constitutionality of court order do not provide lawful defense to its violation). Under these circumstances, Knights' acceptance of a probation search condition was no more than acquiescence to the sentencing court's show of lawful authority.

The only other authority cited by Petitioner is *Zap v. United States*, 328 U.S. 624 (1946), a decision addressing the legality of warrantless inspection of a defense contractor's business records. *Zap*, which has formed the lone pillar supporting the California Supreme Court's

advance consent theory for many years,[14] authorized an inspection of business records; it does not support the constitutionality of a blanket advance consent to unlimited searches of the home and person.

Zap was one of two opinions addressing business records inspections authored on the same date by Justice Douglas. *See also Davis v. United States*, 328 U.S. 582 (1946). Both *Zap* and *Davis* concerned warrantless searches carried out at the contractor's place of business. In each case, the scope of the search was narrowly tailored by an authorizing statute which set forth with particularity the object of the search – business records, and gasoline ration coupons, respectively – and the time, place and manner in which records could be inspected. In each case, the Court found that the business owner had consented to the inspection by virtue of the decision to do business with the government in a heavily regulated industry. Notwithstanding this evidence of "consent," however, the Court still examined the scope of the search and the manner of its execution before concluding, based on all of the facts, that the particular searches at issue were not unreasonable under the Fourth Amendment.[15]

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[14] *Zap* was the only federal precedent invoked by the California Supreme Court as support for the constitutionality of a condition requiring an "advance waiver" of Fourth Amendment rights in exchange for a grant of probation. *Mason*, 488 P.2d at 634; *see also Woods*, 981 P.2d at 1023 (citing *Zap*).

[15] In *Zap*, the business owner executed a contract repeating the same terms set forth by statute. In *Davis*, there was no evidence that the business owner had executed a contract. The existence of the contract was one factor but not determinative in the Court's analysis.

Moreover, Justice Douglas explicitly distinguished the Fourth Amendment analysis applicable to a warrantless inspection of records from the much more stringent analysis that would apply to the search of a private home.[16] *See Davis*, 328 U.S. at 587-88, 592; *Zap*, 328 U.S. at 628 (relying on *Davis*); *see also Donovan v. Dewey*, 452 U.S. 594, 598-99 (1981) (constitution affords "greater latitude to conduct warrantless inspections of commercial property" than private homes because sanctity of home merits significantly greater expectation of privacy). Thus, none of the cases cited by Petitioner supports the claim that acceptance of a search condition purporting to waive Fourth Amendment protections in the home constitutes the type of "consent" sufficient to foreclose further review of the reasonableness of the condition itself.

D. Even If Petitioner Could Establish That Knights Voluntarily Waived His Fourth Amendment Rights in Exchange for the Grant of Probation, the Blanket Waiver of Rights Constitutes an Unconstitutional Condition

Knights has argued that a condition restricting a probationer's Fourth Amendment rights is permissible only if it satisfies the special needs inquiry described in

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[16] While *Zap* states that the petitioner had "waived" his claim to privacy by entering into business in which he specifically agreed to permit inspection of his accounts, subsequent cases have made clear that the evaluation of the reasonableness of a warrantless inspection of a commercial business is not resolved simply by an analysis of the voluntariness of business owner's consent. *See, e.g., United States v. Biswell*, 406 U.S. 311, 315 (1972).

Griffin, and that the instant search condition fails that test. Assuming, *arguendo*, that the Court were to assess the condition instead under Petitioner's consent analysis, and assuming further still that Petitioner could establish that Knights' consent to the search condition was knowing and voluntary, the search condition would nonetheless be unlawful under the doctrine of unconstitutional conditions. To the extent that the state threatened to deny probation to Knights unless he agreed to waive his Fourth Amendment rights (above and beyond the loss of rights contemplated in *Griffin*), the search condition constitutes an unconstitutional penalty on Knights' exercise of a fundamental constitutional right for the same reason that it fails the special needs analysis.

The unconstitutional conditions problem arises when the government, having discretion to grant or deny a benefit, grants the benefit upon conditions that require the offeree to waive a constitutional right. Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 4, 6-7 (1988). The unconstitutional conditions doctrine thus applies in situations, such as this, when the government "seeks to achieve its desired result by obtaining bargained-for consent." *Id.* at 7 (emphasis in original omitted). To determine whether a particular condition improperly penalizes exercise of a constitutional right, the Court has adopted a two-part inquiry: (1) first, is there an "essential nexus" between the condition burdening rights and a "legitimate state interest"; and (2) if so, is there a "rough proportionality" between the burden on the individual and the harm the government seeks to remedy through the condition. *Dolan v. City of Tigard*, 512 U.S. 374, 385-86, 391

(1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987).

The precise meaning of these standards in the Fourth Amendment context is untested, as this Court does not ordinarily apply the unconstitutional conditions doctrine to resolve a Fourth Amendment challenge. *See* Brief of Pet. 22 (citing First Amendment examples). Knights submits that, in the Fourth Amendment context, the inquiry under unconstitutional conditions would mirror the inquiry the Court currently performs under the "special needs" analysis and would thus confirm that the instant probation condition is, indeed, unconstitutional.

Petitioner's limited argument on this front is telling. First, Petitioner's reliance on the California courts' standard to determine the constitutionality of a probation condition is unhelpful, as constitutional questions are resolved by this Court without deference to the state court's views. Second, the only support Petitioner cites for the purported "nexus" between the blanket search condition and legitimate state interests is *Griffin*'s holding that probationers require supervision. Brief for Pet. 22-23. Yet *Griffin* nowhere holds that random, suspicionless searches by law enforcement are related to legitimate goals of probation. To the contrary, the *Griffin* opinion addresses at great length the aspects of a lawful probation search that *distinguish* it from a search by law enforcement. *See Griffin*, 483 U.S. at 876-81. Under *Griffin*, the proposed search condition fails even the first prong of an unconstitutional conditions analysis because a condition requiring a defendant to submit to non-probationary

searches cannot be essentially connected to the state's interest in the operation of its probation system.[17]

The blanket waiver similarly fails the second prong of unconstitutional conditions analysis: the requirement of "rough proportionality." Knights respectfully submits that, in the Fourth Amendment context, the Court would assess proportionality by "weighing the intrusion on the individual's privacy interest against the 'special needs' that supported the program." *See Ferguson*, 121 S. Ct. at 1288. This is, of course, the test already applied under the special needs approach. *Skinner v. Railway Labor Execs. Ass'n*, 489 U.S. 602, 619 (1989) (constitutionality under the Fourth Amendment "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests") (internal citation and quotation marks omitted).

The conclusion that this blanket waiver constitutes an unconstitutional condition is further supported by this Court's rejection of a similar blanket waiver in *Minnesota v. Murphy*, 465 U.S. 420 (1984). In *Murphy*, the defendant challenged the admissibility of incriminating statements he had made to his probation officer. *Id.* at 425. The

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[17] Petitioner repeats the California Supreme Court's frequent, but unsupported, assertion that unlimited, suspicionless searches by police further the probation system by measuring the probationer's compliance with the conditions of his release. Brief for Pet. 22. This ignores the deleterious effect that a complete deprivation of privacy may have on the probationer's rehabilitation. *See, e.g., Mason*, 488 P.2d at 637 (Peters, J., dissenting) ("Such searches [by law enforcement] measure the effectiveness of rehabilitation in the same manner that one fells a tree to measure its age.").

defendant was subject to a probation condition which required him to answer questions from his probation officer truthfully. *Id.* at 422-23. Although the defendant had not asserted his Fifth Amendment privilege during the interview, he argued that the privilege was self-executing because, under the circumstances, he faced a substantial penalty if he exercised his Fifth Amendment rights. *Id.* at 425.

The Court agreed with the defendant's reasoning but not with his premise. Reviewing the actual language of the probation condition, the Court observed that the condition "proscribed only false statements; it said nothing about his freedom to decline to answer . . . and certainly contained no suggestion that his probation was conditional on his waiving his Fifth Amendment privilege." *Id.* at 437. The Court made clear that a condition requiring such an advance waiver would be an unconstitutional condition:

> There is . . . a substantial basis in our cases for concluding that if the state, either expressly or by implication, asserts that invocation of the privilege would lead to revocation of probation, it would have created the classic penalty situation, the failure to assert the privilege would be excused, and the probationer's answers would be deemed compelled and inadmissible in a criminal prosecution.

Id. at 435.

CONCLUSION

A court may not lawfully require from a probationer a waiver of Fourth Amendment rights greater than is necessary to accommodate the "special needs" of the probation system. Mr. Knights' agreement to abide by an unconstitutionally broad search condition was not a knowing and voluntary waiver of rights and does not constitute an enforceable "consent" to warrantless investigatory searches by police. For all of the reasons stated above, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MARK JAMES KNIGHTS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

A. This Court's Analysis Of "Special Needs" Searches Of Probationers Does Not Preclude A State From Instituting A Consent-Search Condition To Supervise Probationers

Respondent contends (Br. 11-23) that under *Griffin* v. *Wisconsin*, 483 U.S. 868 (1987), any warrantless search of a probationer must "be a *probation* search, not an investigatory search conducted to further law enforcement interests." Resp. Br. 14. In respondent's view, a search of a probationer may be deemed to further a "special need" of the government, distinct from the general governmental interest in enforcement of the criminal law, only if the search is conducted by a probation officer whose duties include the rehabilitation

of the probationer as well as the protection of the public. See Resp. Br. 19-20. He therefore argues that the consent-search condition in this case is unconstitutionally broad. *Griffin*, however, does not undermine the constitutionality of California's decision to seek a probationer's consent to searches by any law enforcement officer as a means of assuring adequate supervision.

1. The Court in *Griffin* held that "[a] State's operation of a probation system * * * presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements." 483 U.S. at 873-874. The Court explained that probation is imposed as a sanction for a criminal offense and is contingent upon the probationer's compliance with specified conditions—first among them the duty "to avoid commission of other crimes." *Id.* at 874. The Court concluded that the conditions of probation are designed to further the probationer's rehabilitation and to protect the community, and that "[t]hese same goals require and justify the exercise of supervision to assure that the restrictions are in fact observed. * * * Supervision, then, is a 'special need' of the State permitting a degree of impingement upon privacy that would not be constitutional if applied to the public at large." *Id.* at 875.

In the *next* section of its opinion (see 483 U.S. at 875-880), the Court addressed the question whether the "special needs" of the State in administering its probation system justified the incursion on the probationer's liberty that a nonconsensual warrantless search entailed. In finding the search to be reasonable, the Court relied in part on the fact that the search was overseen not by a police officer, but by a probation officer "who, while assuredly charged with protecting

the public interest, is also supposed to have in mind the welfare of the probationer." *Id.* at 876. But while the identity of the searching officer was deemed relevant to whether the intrusion on privacy from the search was permissible, it played no part in the Court's determination that the "supervision" of probationers is a "special need" of the State distinct from normal law enforcement.

Griffin therefore does not support the effort, undertaken by the court of appeals (see Pet. App. 7a-10a) and embraced by respondent (see Br. 19-20), to distinguish for Fourth Amendment purposes between "probation" and "investigation" searches. The state interest underlying the search condition at issue in this case is to ensure that probationers—persons who have by definition been convicted of criminal offenses (see *Griffin*, 483 U.S. at 874) and who are presumptively "more likely than the ordinary citizen to violate the law" (*id.* at 880)—can be more closely monitored than other members of the population. That monitoring serves both to deter violations of the probation conditions and to detect violations that occur. Those objectives are served equally well whether the monitoring is done by law enforcement or probation officers.

Here, to facilitate supervision of probationers, the Sheriff's Department's records enabled law enforcement personnel to identify probationers subject to the search condition. See Resp. Br. 2, 22. The officer who conducted the search in this case was aware of respondent's probation status and of the search condition, and the officer reasonably suspected respondent of involvement in criminal activity. See Gov't Br. 3 & nn. 2-3. Because respondent's commission of new crimes would violate the most fundamental term of his probation, a search designed to confirm or dispel the

officer's suspicion directly served a core probation purpose. See Gov't Br. 27-28.

2. Respondent repeatedly suggests that *Griffin* identified constitutional *requirements* (including the participation of a probation officer) applicable to any warrantless search of a probationer. See Resp. Br. 14, 15, 17. That is incorrect. The *Griffin* Court did attach significance to the facts that the search in question was (1) conducted by a probation officer, (2) based on reasonable grounds to believe that a probation violation had occurred, and (3) conducted pursuant to a regulatory scheme that itself satisfied the Fourth Amendment's reasonableness requirement. *Griffin* did not, however, hold that any of those features of the Wisconsin scheme was a constitutional prerequisite to a valid warrantless search in the probation context.

In particular, to require that the search be conducted by an official having specific responsibility for the probationer's rehabilitation (see Resp. Br. 19-20) would substantially undermine the institution of summary probation under California law. "A person on summary probation in California is not under the direct supervision of a probation officer." Pet. App. 4a; see *People* v. *Soto*, 212 Cal. Rptr. 696, 699 n.3 (1985) (citation omitted) ("Summary probation * * *, wherein there is probation without any probation officer supervision, * * * entails the defendant reporting only to the court, usually where * * * he commits a subsequent offense."). By making respondent's release on probation contingent on his consent to future searches, the sentencing judge in the state case sought to ensure that respondent could be closely monitored so that "the community [would not be] harmed by the probationer's being at large." *Griffin*, 483 U.S. at 875. Because respondent's release on summary probation did not entail

supervision by a probation officer, the search condition had as a practical matter to be implemented by persons having more general law enforcement responsibilities. The practical result of respondent's position is that summary probation simply cannot operate in that manner; rather, States may authorize warrantless searches of probationers, even with their consent, only if specific officers are assigned to perform a rehabilitative role.

3. As the court of appeals recognized, respondent "did consent to searches when he agreed to the terms of his probation." Pet. App. 7a-8a; see *id.* at 8a n.2; Gov't Br. 11-14. Thus, the question in this case is not whether the supervisory regime at issue here, which involves release into the community subject to close monitoring by law enforcement officers generally, may be imposed on a criminal defendant over his objection. Rather, the question is whether a defendant who is offered an alternative (confinement in a penal institution) that is unquestionably constitutional as a sanction for commission of a criminal act, but who chooses to accept release on probation subject to a search condition, may be held to the consequences of that choice. Nothing in *Griffin* suggests that the defendant's consent to search under those circumstances is invalid.

B. A Consent-Search Condition Does Not Conflict With "Special Needs" Analysis Generally

Apart from *Griffin*, respondent contends (Br. 23-26) that the government's position in this case, on a more general level, conflicts with this Court's "special needs" jurisprudence. Respondent argues that the Court has not analyzed those cases under the rubric of "consent," even though such cases frequently involve persons who become subject to "special needs" searches as a result of their voluntary participation in various endeavors.

The cases on which respondent relies, however, differ from this case in significant respects.

1. Respondent signed a written form by which he expressly "AGREE[D]" to "[s]ubmit his * * * person, property, place of residence, vehicle, [and] personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer." J.A. 50. In light of respondent's explicit written consent, this case does not require the Court to determine whether or under what circumstances an individual may be deemed to have implicitly consented to search by engaging in specified conduct after receiving notice that those who participate in such conduct will be searched.

2. The plaintiffs in the cases on which respondent relies filed suit to challenge the government's authority to condition participation in various public programs on their exposure to searches. This Court understandably did not analyze their claims under the rubric of consent because those plaintiffs had specifically withheld their consent.[1] None of those cases involved a situation in which an individual who *had* consented to search sought to obtain suppression of the evidence that the search produced.

3. A probationer, like a parolee, enjoys only a "conditional liberty" rather than "the absolute liberty to which every citizen is entitled." *Griffin*, 483 U.S. at 874 (quoting *Morrissey* v. *Brewer*, 408 U.S. 471, 480 (1972)). The choice with which respondent was confronted—*i.e.*, selecting between consenting to future searches as a condition of probation on the one hand, or

[1] In *Ferguson* v. *City of Charleston*, 121 S. Ct. 1281 (2001), the question of consent was contested, but the Court decided the case on the premise that consent had not been given. See *id.* at 1288.

submitting to incarceration on the other—was the direct result of his conviction of a criminal act, for which the State might constitutionally have imprisoned him regardless of his preference. Although respondent's status as a probationer did not deprive him of all Fourth Amendment protections, see *id.* at 873, his diminished liberty interest is surely relevant to the constitutional analysis. The cases cited by respondent (see Br. 24-26) do not involve situations in which an individual's potential exposure to search resulted from his criminal conviction.

C. A Probationer's Consent Need Not Take The Form Of A Knowing And Intelligent Waiver In Order To Meet Fourth Amendment Standards

Respondent argues (Br. 26-40) that a criminal defendant's consent to a category of future searches is valid and enforceable only if it is knowing and intelligent under the standards set forth in *Johnson* v. *Zerbst*, 304 U.S. 458, 464-465 (1938). Respondent contends that his agreement to submit to future searches does not constitute a valid consent because he was not specifically informed, at the time he signed the probation order, of his right to refuse consent. That claim lacks merit.

In *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973), this Court held that

> the question whether a consent to a search was in fact "voluntary" or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances. While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent.

Id. at 227. In *Ohio* v. *Robinette*, 519 U.S. 33, 39 (1996), this Court reaffirmed the *Schneckloth* Court's rejection of the argument that a consent to search "could not be valid unless the defendant knew that he had a right to refuse the request."

Respondent acknowledges (Br. 30) that under *Schneckloth*, "the Fourth Amendment protection against warrantless searches could be lost through a defendant's voluntary consent to search, even without knowledge of the right to decline." He contends, however, that a different rule should apply where, as here, a defendant consents to a category of future searches as part of the disposition of a criminal charge. Respondent argues that "a formal agreement to relinquish Fourth Amendment rights in the future, * * * obtained by 'a trial judge in the structured atmosphere of a courtroom,' must comply with the *Johnson v. Zerbst* requirements." Resp. Br. 32 (quoting *Schneckloth*, 412 U.S. at 244).

The Court in *Schneckloth* did note the infeasibility of applying the *Johnson* v. *Zerbst* standard to the sort of fluid encounters that often precede consensual searches. See, *e.g.*, 412 U.S. at 245 ("It would be unrealistic to expect that in the informal, unstructured context of a consent search, a policeman, upon pain of tainting the evidence obtained, could make the detailed type of examination demanded by *Johnson*."). The principal thrust of the Court's analysis, however, was that the *Johnson* v. *Zerbst* standard was inapplicable to Fourth Amendment cases because that standard was designed to protect a different sort of constitutional right. The *Schneckloth* Court stated that "[o]ur cases do not reflect an uncritical demand for a knowing and intelligent waiver in every situation where a person has failed to invoke a constitutional protection," *id.* at 235,

and explained that "[a]lmost without exception, the requirement of a knowing and intelligent waiver has been applied only to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial," *id.* at 237. The Court concluded that

> [t]here is a vast difference between those rights that protect a fair criminal trial and the rights guaranteed under the Fourth Amendment. Nothing, either in the purposes behind requiring a "knowing" and "intelligent" waiver of trial rights, or in the practical application of such a requirement suggests that it ought to be extended to the constitutional guarantee against unreasonable searches and seizures.

Id. at 241.[2]

Schneckloth therefore does not support respondent's contention that the formal courtroom environment in which his consent to search was executed mandated an advisement of rights that is not required for consent searches generally. To the contrary, that courtroom setting, far from casting doubt on the voluntariness of respondent's consent to future searches, provides additional assurance that the consent was not the product of coercion or duress. The formal and public setting of

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[2] Indeed, even with respect to constitutional rights specific to the criminal trial process, no categorical rule mandates that a defendant must have knowledge of the right before he may validly relinquish it. In *United States* v. *Broce*, 488 U.S. 563, 573 (1989), for example, this Court noted that "[o]ur decisions have not suggested that conscious waiver is necessary with respect to each potential defense relinquished by a plea of guilty." The Court then held that the plea in that case had relinquished a potential defense under the Double Jeopardy Clause of which the defendant had no knowledge. *Id.* at 572-574.

respondent's consent provides obvious protections against official pressure. Moreover, because respondent was sentenced to 90 days' imprisonment in addition to probation (see Gov't Br. 2 n.1), he was constitutionally entitled to be represented by counsel in connection with the state criminal charge. See *Argersinger* v. *Hamlin*, 407 U.S. 25, 37 (1972).

At the time of respondent's state conviction, the established rule of California law was that a criminal defendant may not be compelled to accept probation. See Gov't Br. 17. Although the record in this case does not reveal whether respondent's attorney in the state proceedings advised him of his right to decline probation, the circumstances surrounding respondent's consent to search make it more rather than less likely that the consent was the product of an uncoerced choice. If police officers in a street encounter are not required to inform the potential subject of a search of his right to refuse consent, there is no reason to impose such a requirement in a setting where the subject is afforded substantial alternative protections against the deprivation of Fourth Amendment rights.

D. Respondent's Consent Was Not Shown To Be Compelled By A Claim Of State Authority To Search

Much the same analysis applies to respondent's contention (Br. 36-40) that his signature on the probation form was not a "consent" to searches at all, but simply "acquiescence" to the State's claim of lawful authority to search. The form that respondent signed stated that he "AGREE[D] TO ABIDE BY" the conditions of probation, including the condition that his person and property were subject to search at any time. J.A. 50. Respondent's "AGREE[MENT]" arose out of a formal

judicial proceeding in which he was constitutionally entitled to representation by counsel, and prior decisions of the California Supreme Court had made clear that under state law a criminal defendant could not be sentenced to probation over his objection. Indeed, the court of appeals in this case, while holding that respondent's consent was invalid as applied to searches conducted for investigative purposes, recognized that respondent "did consent to searches when he agreed to the terms of his probation." Pet. App. 7a-8a.

This Court's decision in *Zap* v. *United States*, 328 U.S. 624 (1946), makes clear that an individual's consent to a category of future searches may be deemed valid and enforceable even when that consent is a required condition for receipt of a valuable government benefit (there, government contracts). See Gov't Br. 15-17. Contrary to respondent's suggestion (Br. 38-40), the decision in *Zap* did not turn on the commercial character of the property that was searched. Indeed, in subsequent cases involving residential or personal property, the Court has cited *Zap* as authority for the proposition that voluntary consent renders a search lawful. See *Schneckloth*, 412 U.S. at 219; *Texas* v. *Brown*, 460 U.S. 730, 736 (1983) (plurality opinion); Gov't Br. 17 n.7.[3]

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[3] Respondent also suggests (Br. 40 n.16) that *Zap* has been superseded by this Court's subsequent decision in *United States* v. *Biswell*, 406 U.S. 311, 315 (1972), which held that "[i]n the context of a regulatory inspection system of business premises that is carefully limited in time, place, and scope, the legality of the search depends not on consent but on the authority of a valid statute." *Biswell*, however, did not involve a situation where a business owner was required to execute an express contractual consent to future searches as a condition of a government benefit. Rather, the Court in *Biswell* simply addressed and rejected the suggestion

E. The Consent Given By Respondent Was Not An Unconstitutional Condition Of His Probation

"Under the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right * * * in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the" right whose waiver is at issue. *Dolan* v. *City of Tigard*, 512 U.S. 374, 385 (1994); see Gov't Br. 21-22. Respondent contends that the State of California may not, consistent with the unconstitutional conditions doctrine, make a criminal defendant's consent to future searches a prerequisite to release on probation. Respondent argues (Br. 40-44) that the condition is invalid because (1) no "essential nexus" exists between the condition and the State's interest in administering its probation system, and (2) there is no "rough proportionality" between the burden imposed on the probationer and the government interest that the search condition is intended to protect. Those arguments lack merit.

1. Respondent argues (Br. 42-43) that the requisite nexus between the search condition and the relevant state interest is lacking because "[u]nder *Griffin*, * * * a condition requiring a defendant to submit to non-probationary searches cannot be essentially connected to the state's interest in the operation of its probation

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that a business owner had consented to search by failing to resist a government agent who asserted a statutory right to inspect the premises. *Ibid.* Here, the government does not contend that respondent consented to the search of his apartment by declining to offer resistance at the time the search took place. Rather, the relevant consent occurred when respondent accepted release on probation and agreed to the search condition.

system." That argument lacks merit for the reasons stated at pages 2-4, *supra*. A search of a known probationer, intended to confirm or dispel a law enforcement officer's suspicion of new criminal conduct, is not properly characterized as a "non-probationary" search. Particularly under a probation scheme that does not involve supervision by a probation officer, the requirement that a defendant consent to search by law enforcement officers if he is to be released on probation bears a direct relationship to the State's interest in ensuring that probationers comply with the terms of their release so that "the probation serves as a period of genuine rehabilitation and * * * the community is not harmed by the probationer's being at large." *Griffin*, 483 U.S. at 875.

2. Assuming that some form of the "rough proportionality" test articulated in *Dolan* (512 U.S. at 391) extends beyond required dedications of real property interests and applies to unconstitutional-conditions claims generally, that test is satisfied here. "[I]t is the very assumption of the institution of probation that the probationer is in need of rehabilitation and is more likely than the ordinary citizen to violate the law." *Griffin*, 483 U.S. at 880. The probationer's knowledge that his person or property may be searched at any time can reasonably be expected to reduce the frequency of probation violations. See *id.* at 876 (imposition of warrant requirement for searches of probationers "would reduce the deterrent effect that the possibility of expeditious searches would otherwise create"). (That is so even assuming, *arguendo*, that indiscriminate or too-frequent searches might undermine the rehabilitative aspects of probation, see Resp. Br. 43 n.17.) And searches by law enforcement officers

can reveal the existence of probation violations that might otherwise have gone undetected.

The proportionality of the consent-search condition is also supported by the fact that if a prisoner chose incarceration rather than release on probation, he would be subject to wholly random searches in prison. An incarcerated prisoner has *no* expectation of privacy in his cell. See *Hudson* v. *Palmer*, 468 U.S. 517, 522-530 (1984). Thus, the consent-search condition does not involve an intrusion on privacy that deprives the defendant of a right he would otherwise enjoy if he elected to remain in prison. Accordingly, the requirement that a defendant consent to future searches in order to receive probation is proportionate both to the threat to public safety that the defendant's release may pose and to the limited privacy interests possessed by a convicted defendant whose alternative to probation is imprisonment.

Respondent contends (Br. 42) that "in the Fourth Amendment context, the inquiry under unconstitutional conditions would mirror the inquiry the Court currently performs under the 'special needs' analysis." While this Court has never so held, as a practical matter, the choice between the two approaches is unlikely to have outcome-determinative effects—and would not do so here—so long as respondent's right to refuse probation on the state charge is recognized as relevant to the "special needs" balancing. In *Vernonia School District 47J* v. *Acton*, 515 U.S. 646 (1995), for example, this Court employed "special needs" analysis in concluding that student athletes could constitutionally be required to undergo random drug testing as a condition of participation in interscholastic sports. *Id.* at 652-666. In concluding that such testing imposed no substantial intrusion on the students' legitimate privacy expecta-

tions, the Court relied in part on the diminished privacy expectations of elementary and secondary school students generally. See *id.* at 654-657. The Court also observed, however, that "[t]here is an additional respect in which school athletes have a reduced expectation of privacy. By choosing to 'go out for the team,' they voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally." *Id.* at 657. Similarly here, if this Court were to scrutinize the consent-search condition under the rubric of "special needs," respondent's right under California law to decline probation and to accept an unquestionably constitutional alternative sanction would be directly relevant to the Fourth Amendment analysis and would support the conclusion that the consent-search condition is reasonable.[4]

3. Respondent's reliance (Br. 43-44) on *Minnesota* v. *Murphy*, 465 U.S. 420 (1984), is misplaced. The Court in *Murphy* suggested, though it did not squarely hold, that the government may not make release on probation contingent on an individual's willingness to forgo exercise of his Fifth Amendment privilege against self-incrimination (although the probationer's failure to provide required answers can support or contribute to a revocation of probation). See *id.* at 435 & n.7. Upholding the search condition here, however, does not imply

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[4] The likelihood that few defendants would prefer imprisonment to probation with a consent-search condition does not render the consent involuntary as a matter of law. See Gov't Br. 24. If the conditions of probation were made substantially more onerous, so that many defendants believed release on probation to be less desirable than incarceration, the constitutional relevance of the defendant's right to choose between the two sanctions would be apparent. The State does not negate the element of choice by making the terms of probation more favorable to the defendant.

that release on probation may be conditioned on a renunciation of any and all constitutional rights. See Gov't Br. 22. And there is no basis for respondent's effort to extrapolate any Fifth Amendment rule found in *Murphy* to the Fourth Amendment context presented here. The probationer in *Murphy* sought to assert a right (protection against compelled self-incrimination) that an incarcerated prisoner would retain. Here, by contrast, respondent, by agreeing to the consent-search condition, did not surrender any Fourth Amendment protection that he would have had if he had chosen (or California had imposed) the alternative sanction of imprisonment. See *Hudson* v. *Palmer*, *supra*.

* * * * *

For the reasons stated above and in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

MARK JAMES KNIGHTS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CENTER FOR THE COMMUNITY INTEREST AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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This amicus curiae brief is submitted in support of petitioner, the United States of America. By letters filed with the Clerk of the Court, petitioner and respondent have consented to the filing of this brief.[1]

INTEREST OF THE AMICUS

The Center for the Community Interest is a national non-profit public interest organization founded to provide a voice for localities and community groups on public safety and quality-of-life issues. CCI helps cities, states, civic associations, and community groups to develop and defend policies that strike a reasonable balance between the rights of the individual and the needs of the larger community. Through its National Neighborhood Safety Legal Network, CCI has organized and provided legal advice to hundreds of citizens groups across the nation, and has developed a nationally recognized expertise on legal issues affecting the safety and quality of life of communities. CCI has participated in a wide range of public safety and quality-of-life cases before this Court and other courts throughout the country,[2] and has developed model legislation, policies, and Internet resources that assist communities in addressing problems such as illegal gangs, disorder in public spaces,

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[1] This brief was prepared in whole by the counsel listed on the cover. No person or entity, other than the amicus curiae, their members, and their counsel, made a monetary contribution to the preparation or submission of this brief.

[2] Most recently, CCI participated as amicus curiae before this Court in *Dickerson v. United States*, 530 U.S. 428 (2000) (supporting the admissibility of voluntary confessions given in the absence of Miranda warnings); *Kansas v. Hendricks*, 521 U.S. 346 (1997) (defending civil commitment of certain dangerous sexual offenders); *Montana v. Egelhoff*, 518 U.S. 37 (1996) (supporting reasonable restrictions on criminal defenses available to drunk drivers); *Bennis v. Michigan*, 516 U.S. 442 (1996) (defending asset forfeiture programs to control street prostitution).

nuisance properties, open-air drug markets, and adult businesses in residential neighborhoods.

CCI is extremely concerned that the decision of the Ninth Circuit in this case, if ratified by this Court, would dangerously restrict the ability of probation and parole authorities across the country to supervise and monitor convicted criminals effectively and would thus compromise neighborhood safety. Moreover, as advocates for a reasonable and sensitive balance between individual liberties and public safety and strong believers in the goals of rehabilitation, CCI is concerned that the Court's decision will have the untoward effect of limiting the availability of probation and parole for all offenders, including those who could be successfully reintegrated into the community.

SUMMARY OF ARGUMENT

The warrantless, without reasonable suspicion ("suspicionless"), search of Knights' residence by police officers pursuant to a consent condition of his probation did not violate his Fourth Amendment rights. This is a vital issue for probation and parole ("community supervision") programs. Any significant limitation on the ability of such programs to monitor probationers and parolees undermines their effectiveness. The recent trend in state and federal courts, the U.S. Court of Appeals for the Ninth Circuit notwithstanding, has been to find that warrantless, suspicionless searches conducted pursuant to a community supervision policy are constitutionally valid.

The Court has recognized that it is ill-suited to address the complex and urgent problems associated with administration of the penal system. Accordingly, in evaluating prison policies that allegedly infringe the constitutional rights of inmates, the Court has applied the legitimate interests test instead of strict scrutiny. The same deferential standard should also be applied to community supervision policies. Community supervision is a variation

on imprisonment and has become the primary means of punishing and monitoring criminals under sentence. Just as limitations on the constitutional rights of prisoners are justified in prisons by the need to deter crime, rehabilitate prisoners, and maintain institutional security, appropriate limitations are justified in probation and parole systems by the need to deter recidivism, monitor rehabilitation, and maintain community security. A deferential standard of review for determining the constitutionality of official policies is needed in both contexts.

In the United States, 4.4 million people are currently on probation or parole, including many violent offenders. Accordingly, community supervision programs have a substantial, not merely legitimate, interest in closely controlling and monitoring probationers and parolees. Community supervision programs utilizing warrantless, suspicionless searches, notably in the city of Boston, Massachusetts, have been extremely successful in reducing recidivism and deterring crime. As a result, similar programs are being implemented rapidly across the country, and prohibiting them from using warrantless, suspicionless searches would significantly impair the effectiveness of the programs. For these reasons, the Court should reverse the Ninth Circuit and determine that, regardless of the validity of Knights' consent, the search of his residence was within the legitimate interests of the California probation system and did not violate the Fourth Amendment.

ARGUMENT

CCI urges the Court to reverse the decision of the Ninth Circuit and hold that the search of Knights' residence by the Sheriff's Department of Napa County, California was reasonable and did not violate Knights' Fourth Amendment rights. We first discuss the application of the legitimate interests test to prison regulations and policies and then show that the Court should apply the same deference in the parole

or probation context. Application of that test demonstrates that warrantless, suspicionless searches are reasonably related to the legitimate interests of community supervision systems and therefore are reasonable under the Fourth Amendment.

I. THE SUSPICIONLESS SEARCH OF KNIGHTS' RESIDENCE IS VALID UNDER THE FOURTH AMENDMENT BECAUSE IT WAS REASONABLY RELATED TO A LEGITIMATE PAROLE INTEREST.

CCI urges the Court to hold that warrantless, suspicionless searches of probationers and parolees are constitutional.[3] The Court should reach this holding by applying the legitimate interests test currently used to assess prison policies that allegedly infringe the constitutional rights of prisoners. Under this standard of review, community supervision policies and practices are constitutionally valid, and a search is reasonable under the Fourth Amendment, if it is reasonably related to legitimate community supervision interests. Warrantless, suspicionless searches of supervisees more than satisfy the reasonable relationship requirement because strict controls and effective monitoring systems are a crucial part of deterring recidivism and fostering rehabilitation of criminals under sentence, whether the sentence is being served within or outside prison walls.

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[3] For purposes of the issues discussed here, probation and parole systems should be treated similarly. *See United States v. Hill*, 967 F.2d 902, 909 (3d Cir. 1992) ("There is 'no constitutional difference between probation and parole for the purposes of the fourth amendment.'") (quoting *United States v. Harper*, 928 F.2d 894, 896 n.1 (9th Cir. 1991).

A. The Court Should Evaluate Alleged Constitutional Infringements in Probation Programs Under the Same Deferential Standard It Applies to Prison Regulations and Policies.

When addressing constitutional claims in the prison context, the Court has recognized that, unlike the executive and legislative branches, courts are ill-equipped to address the complex problems involved in prison administration. As a result, the Court has applied the legitimate interests test to evaluate allegations that official conduct pursuant to a prison regulation or policy infringed an inmate's constitutional rights. For similar reasons, the Court should afford the same deference in the parole and probation context.

1. Prison Regulations and Policies Are Afforded Considerable Deference Because, Unlike the Legislative and Executive Branches, Courts Are Ill-Equipped to Deal with the Problems Inherent in Penal Administration.

When evaluating the constitutionality of prison regulations and policies, the Court has refused to apply strict scrutiny and instead has adopted a policy of judicial restraint. The Court's approach when an inmate alleges that a prison regulation or policy infringes a constitutional right is to find that the regulation or policy "is valid if it is reasonably related to legitimate penological interests."[4] This deferential standard balances the need to protect the constitutional rights of prisoners with the recognition that "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform."[5] The "complex and intractable" issues presented by the penal system simply can not be

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[4] *Turner v. Safley*, 482 U.S. 78, 89 (1987).

[5] *Procunier v. Martinez*, 416 U.S. 396, 404-05 (1974), *overruled on other grounds, Thornburgh v. Abbott*, 490 U.S. 401 (1989).

effectively addressed by judicial decree.[6] Instead, they "require[] expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government."[7]

2. *Probation and Parole are an Integral Part of the Penal System, the Administration of Which, Like Prison Management, Requires Judicial Deference.*

The Court should apply the same legitimate interests test to community supervision programs that it uses to evaluate allegations of constitutional rights violations in the prison context. The Court has always recognized that probation and parole are variations on imprisonment.[8]

> Probation is simply one point (or, more accurately, one set of points) on a continuum of possible

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6 *Turner*, 482 U.S. at 84.

7 *Id.* at 85. As the Court explained in *Turner*, "Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration. The rule would also distort the decision making process, for every administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand. Courts inevitably would become the primary arbiters of what constitutes the best solution to every administrative problem, thereby 'unnecessarily perpetuat[ing] the involvement of the federal courts in affairs of prison administration.'" *Id.* at 89 (quoting *Procunier*, 416 U.S. at 407).

8 *See Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987) ("Probation, like incarceration, is 'a form of criminal sanction imposed by a court upon an offender after verdict, finding, or plea of guilty'") (quoting G. Killinger et al., *Probation and Parole in the Criminal Justice System* 14 (1976)); *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972) ("Rather than being an *ad hoc* exercise of clemency, parole is an established variation on imprisonment of convicted criminals.").

> punishments ranging from solitary confinement in a maximum-security facility to a few hours of mandatory community service. A number of different options lie between those extremes, including confinement in a medium or minimum-security facility, work release programs, 'halfway houses,' and probation -- which can itself be more or less confining depending upon the number and severity of restrictions imposed.[9]

The similarity between community supervision and incarceration is reflected in the fact that probationers and parolees have only a conditional liberty interest dependent on observance of special restrictions.[10]

In fact, parole and probation are increasingly replacing the use of prisons as the primary method of punishing and rehabilitating criminals,[11] in large part as a result of decreasing prison space[12] and escalating prison costs.[13] At

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9 *Griffin*, 483 U.S. at 874.

10 *See id.* ("To a greater or lesser degree, it is always true of probationers (as we have said it to be true of parolees) that they do not enjoy 'the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special [probation] restrictions.'") (quoting *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972)).

11 *See* Joan Petersilia, *A Crime Control Rationale for Reinvesting in Community Corrections*, 75 PRISON J. 479, 480-81 (1995); Dale G. Parent et al., National Inst. of Justice, U.S. Dep't of Justice, *Responding to Probation and Parole Violations*, July 1994, at 1.

12 Prison populations have increased dramatically leading to a serious overcrowding problem. *See, e.g.*, Bureau of Justice Statistics, U.S. Dep't of Justice, *Corrections Statistics*, July 23, 2000 (incarceration rate has more than tripled since 1980, with the incarceration population growing an average 5.7% annually between 1990 and midyear 1999); *see also* Kerry L. Pyle, *Prison Employment: A Long-Term Solution to the*

the end of 1999, the entire correctional population in the United States reached 6.3 million people or 3.1% of the entire population. Of these 6.3 million people, over half, 3.7 million individuals, were on probation, and an additional 712,713 were on parole.[14] In addition, roughly 600,000 prisoners are expected to be released from federal and state prisons into parole in 2001.[15]

As probation and parole populations rise, the total number of people formally supervised under community supervision programs is also increasing.[16] The increased reliance on community supervision means that many violent offenders live in our communities. As the Court has recognized, these individuals "are more likely to commit future criminal offenses than are average citizens."[17]

Overcrowding Crisis, 77 B.U. L. REV. 151, 152 (1997) (discussing problem of prison overcrowding).

13 Nationally, the total spent on corrections in fiscal year 1996 reached $24.5 billion, or nearly 80% of all corrections expenditures. State expenditures have risen 85% since 1990, while federal expenditures have grown 160% since 1990. *See* James J. Stephan, *State Prison Expenditures, 1996*, Bureau of Justice Statistics, U.S. Dep't of Justice, August 1999.

14 *See* Bureau of Justice Statistics, U.S. Dep't of Justice, *U.S. Correctional Population Reaches 6.3 Million Men and Women: Represents 3.1 Percent of the Adult U.S. Population*, July 23, 2000.

15 *See* Eric Lichtblau, *Decline in Crime Ending: FBI Says Violence Data Show a Leveling Off in U.S. After Years of Lower Rates*, L.A. TIMES, May 31, 2001, at A1.

16 In addition, in 1999, 71% of the total corrections population was supervised as part of formal probation or parole programs. *See* Bureau of Justice Statistics, *supra* note 14.

17 *Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U.S. 357, 365 (1998).

Further, the objectives of community supervision are substantially similar to the objectives of prisons. Just as the limitation on the constitutional rights of prisoners is justified in prisons by the need to deter crime, rehabilitate prisoners, and maintain institutional security,[18] appropriate limitations are justified in probation and parole systems by the need to deter recidivism, monitor rehabilitation, and maintain community security.[19] Like the running of a prison, administering a community supervision program is "an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government."[20] Accordingly, when a community supervision regulation impinges on the constitutional rights of probationers or parolees, the regulation should be valid if it is reasonably related to legitimate community supervision interests.

3. The Legitimate Interests Test Should Be Applied to Alleged Fourth Amendment Violations of Probationers and Parolees.

As established above, the legitimate interests test should be applied to community supervision regulations impacting the constitutional rights of probationers and parolees, including community supervision regulations related to

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18 *See O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987).

19 *See Griffin*, 483 U.S. at 875 ("[Probation] restrictions are meant to assure that the probation serves as a period of genuine rehabilitation and that the community is not harmed by the probationer's being at large."); Mark A.R. Kleinman et al., BOTEC Analysis Corp., Massachusetts Inst. For a New Commonwealth, *Criminal Justice in Massachusetts: Putting Crime Control First*, Oct. 1996, at 20 (goals of probation and parole include deterring recidivism, rehabilitating offender, and protecting community).

20 *Turner v. Safley*, 482 U.S. 78, 84-85 (1987).

searches. In *Griffin v. Wisconsin*, the Court examined a Fourth Amendment claim by a probationer and stated that a "[s]tate's operation of a probation system, like its operation of a school, government office or prison," likewise presents "'special needs' beyond normal law enforcement" that justifies departure from the usual warrant and probable cause requirements.[21] While the Court has "not hesitated to balance the government and privacy interests to assess the practicality of the warrant and probable cause requirements,"[22] the balancing test is not the exclusive means by which Fourth Amendment questions may be resolved in a "special needs" situation. As required by the Court's holding in *Turner*, courts have applied the legitimate interests test to all prisoners' constitutional claims, including Fourth Amendment claims.[23] Moreover, in *Griffin*, the Court alluded to the possibility of applying the legitimate interests test in the probation context, but did not decide the question.[24] The Court should now take the next step and

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21 *Griffin*, 483 U.S. at 873-74.

22 *Skinner v. Railway Labor Execs. Ass'n*, 489 U.S. 602, 619-20 (1989). The Court has used this balancing test, in upholding mandated drug testing of railway employees (*see id.* at 619-33), random drug testing of student athletes (*see Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 653-66 (1995)), drug testing of customs agents (*see National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 664-66 (1989)), warrantless inspections of highly regulated businesses (*see New York v. Burger*, 482 U.S. 691, 699-703 (1987)), work-related searches of employees' desks and offices (*see O'Connor v. Ortega*, 480 U.S. 709, 721-25 (1987)), searches of students conducted by public school officials (*see New Jersey v. T.L.O.*, 469 U.S. 325, 337-42 (1985)), and body-cavity searches of inmates (*see Bell v. Wolfish*, 441 U.S. 520, 560 (1979)) as reasonable searches under the Fourth Amendment.

23 *See Thompson v. Souza*, 111 F.3d 694, 699 (9th Cir. 1997); *Covino v. Patrissi*, 967 F.2d 73, 78 (2d Cir. 1992); *Williams v. Price*, 25 F. Supp. 2d 605, 609 (W.D. Pa. 1997).

24 *See* 483 U.S. at 874 n.2.

hold that the legitimate interests test is the appropriate standard by which to evaluate Knights' Fourth Amendment claim.

B. The Legitimate Interests of Supervision of Parolees Require Intensive Monitoring, Including Policies of Conducting Warrantless, Suspicionless Searches of Supervisees.

In this part of the brief, we discuss the four-factor approach the Court has developed to apply the legitimate interests test to official prison conduct and the ways to adapt that approach to probation and parole cases. We then apply the factors to warrantless, suspicionless searches to show that such searches are reasonably related to the legitimate interests of probation or parole. This analysis does not depend on whether a probationer or parolee properly consented to the search as a condition of probation or parole. In the probation and parole context, the only question under the legitimate interests test is whether the policy permitting warrantless, suspicionless searches is valid, regardless of whether the policy includes obtaining the consent of the supervisee.

1. The Court Should Adapt the Factors Used in Applying the Legitimate Interests Test in Prison Cases to Community Supervision Cases.

The factors used to apply the legitimate interests test to prison regulations and policies should be used to evaluate constitutional challenges to official conduct in parole and probation cases. The *Turner* court set out four factors to use in evaluating whether a challenged regulation or policy is "reasonably related" to legitimate interests: first, whether a rational connection exists between the regulation or policy and the legitimate governmental interest invoked as a justification for the action; second, whether alternative means of exercising the right allegedly being infringed remain open

for the inmate; third, whether accommodation of the right allegedly being infringed will have an adverse impact on guards, other inmates, and prison resources; and finally, whether obvious, easy alternatives to the regulation or policy exist.[25]

Although the factors are specific to "prisoner rights" litigation,[26] they provide substantial guidance on how to establish the "reasonably related" connection in community supervision litigation. In *Thompson v. Souza*, a case examining alleged Fourth Amendment violations in the prison context, the Ninth Circuit found *Turner's* four factors "instructive" despite the fact that "[n]ot all four factors will be relevant" for every constitutional claim.[27]

Although prisons and community supervision systems have similar legitimate interests and courts should apply similar factors in evaluating whether a regulation or policy is reasonably related to those legitimate interests, this does not mean that a court would necessarily reach the same conclusion concerning the validity of a regulation or policy affecting prisoners and community supervisees. For example, in *O'Lone v. Estate of Shabazz*, this Court held that a prison policy affecting the ability of Muslim inmates to attend religious services was reasonably related to legitimate penological interests.[28] It is less likely that a policy decision having a similar effect on a group of probationers or parolees would satisfy the "reasonably related" factors. The factors need to be applied on a case-by-case basis with the relevant

25 *See Turner*, 482 U.S. at 89-90.

26 *Thornburgh v. Abbott*, 490 U.S. 401, 414 (1989).

27 111 F.3d at 699 (quoting *Michenfelder v. Sumner*, 860 F.2d 328, 331 n.1 (9th Cir. 1988)).

28 *See* 482 U.S. 342, 353 (1987).

differences between prisons and community supervision systems taken into account.

2. *Consideration of the Requisite Factors Demonstrates That a Policy Decision to Conduct Warrantless, Suspicionless Searches is Reasonably Related to the Legitimate Interests of Community Supervision.*

A policy decision to conduct warrantless, suspicionless searches, when examined using the four factors articulated in *Turner*, is reasonably related to the legitimate interests of community supervision. Probation and parole are a common alternative to incarceration in the United States. As probation and parole sentences increasingly incorporate some aspect of community supervision, the ability to conduct warrantless, suspicionless searches is not only rationally related to the interests of probation and parole systems, but is crucial to the basic execution of these sentences.

Intensive supervision programs date to the early 1980s, when the state of Georgia developed the first program that utilized teams of probation officers to closely monitor small numbers of probationers.[29] Since 1985, virtually every state has developed some sort of intensive supervision program.[30] In the twenty years since these programs were introduced, studies have shown that the most successful programs are those that thoroughly and actively monitor every aspect of the subject's daily life. Effective supervision typically includes monitoring the probationer or parolee through unannounced home and work visits.[31] "By combining police

29 *See* Joan Petersilia, *A Decade of Experimenting with Intermediate Sanctions: What Have We Learned?*, FED. PROBATION, Dec. 1989, at 3.

30 *See id.* at 5.

31 *See id.* at 9.

and probation resources, probation supervision has become a 24-hour-a-day, highly accountable reality."[32]

The model city for modern intensive supervision programs is Boston, Massachusetts. Between 1990 and 1995, twenty-five percent of gun and knife homicides in Boston were committed by individuals on probation at the time of these offenses.[33] This statistic, and the rising number of juveniles killed in Boston, prompted the city to create two intensive supervision programs.

Boston's Operation Ceasefire and Operation Night Light were started in 1996. The Ceasefire program implemented strict supervision of parole, probation, and bail conditions including frequent home visits and random stops.[34] The Night Light program is similar but focuses on high-risk youth offenders and organizes supervision teams who visit homes of high-risk probationers and parolees up to four nights a week to ensure they are complying with their probation or parole terms.[35] As a result of these programs, the number of homicides in Boston dropped from 152 in 1990 to *31* in 1999.[36] In fact, Boston went *two and a half years* without a

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32 *Id.* at 8.

33 *See* Candace Zierdt, *The Little Engine that Arrived at the Wrong Station: How to Get Juvenile Justice Back on the Right Track*, 33 U.S.F.L. REV. 401, 430 (1999).

34 *See* David M. Kennedy, *Pulling Levers: Chronic Offenders, High-Crime Settings, and a Theory of Prevention*, 31 VAL. U. L. REV. 449, 462-63 (1997).

35 *See* James T. Jordan, *Boston's Operation Night Light: New Roles, New Rules*, The FBI Law Enforcement Bulletin, Aug. 1, 1998, at 1 ("FBI Law Enforcement Bulletin").

36 *See* Editorial, *Law Enforcement Losses*, BOSTON GLOBE, May 3, 2001, at A14.

single youth gun homicide.[37] . A 1997 Boston police department study showed that more than fifty percent of the city's probationers were in compliance with their probation terms, up from an average of seventeen percent in the early 1990s, before the Ceasefire and Night Light programs were instituted.[38]

The "Boston Plan," as it has come to be known, has been heralded by both President Clinton and President Bush as a model for probationer and parolee re-entry into society.[39] It has been studied and copied extensively throughout the country.[40] Over 560 law enforcement and municipal agencies have requested information from the Night Light program and representatives from over 140 law enforcement

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37 *See* Elizabeth Mehren, *National Perspective Crime: Boston's Youth Violence Program Becomes Model for Nation, Collaborative Effort Between Community and Police Credited with Reducing Homicides*, L.A. TIMES, Aug. 24, 1998, at A5.

38 *See* FBI Law Enforcement Bulletin, at 1.

39 President Clinton copied measures from Boston's Ceasefire and Night Light programs in his July 1998 Anti-Gang and Youth Violence Strategy, in a 1999 memorandum calling for the development of a youth violence prevention strategy, and in the largest national firearms enforcement initiative in American history, unveiled in January 2000. In May 2001, President Bush based his gun violence reduction plan, Operation Safe Neighborhoods, on Boston's Operation Ceasefire. *See White House Fact Sheet on Anti-Gang, Youth Violence Strategy*, U.S. NEWSWIRE, July 22, 1998; *President's Memorandum on Deterring and Reducing Gun Crime*, 35 WEEKLY COMP. PRES. DOC. 12, Mar. 20, 1999; *President Clinton Unveils Largest Ever National Gun Enforcement Initiative, Hails New Prosecution Data*, M2 PRESSWIRE, Jan. 19, 2000; *U-Pennsylvania: Bush Targets Gun Violence During Philadelphia Speech*, U-WIRE, May 18, 2001.

40 *See* List of Programs Inspired by the Boston Plan, attached at Appendix A.

and other public agencies have come to Boston to study the program first hand.[41]

Intensive supervision through unannounced visits is the building block of the "Boston Plan" programs started in numerous cities across the country.[42] As in Boston, these programs use frequent home visits and random stops to

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41 *See* FBI Law Enforcement Bulletin, at 1. In May 2001, PolicyLink, a California think tank, issued a 180-page report in which it advocated community-based policing, such as that used in Boston, as a national strategy for handling youth violence. *See* John Ellement, *Think Tank Praises Boston Police*, BOSTON GLOBE, May 17, 2001, at B5.

42 Programs utilizing searches of offenders' homes and workplaces have been started in Nebraska (Omaha Operation Ceasefire, Operation Night Light, and Project Impact), Texas (Spotlight Project), Virginia (Arlington Police and Probation Co-operation program), Tennessee (Memphis Operation Night Light), New Mexico (Albuquerque Operation Night Light), Maryland (Baltimore Operation Safe Neighborhoods), North Carolina (Greensboro and High Point Violent Crime Task Force), Missouri (Kansas City Operation Night Light), Florida (Tampa Operation Night Light), Wisconsin (Milwaukee Operation Ceasefire). *See* Tanya Eiserer, *Project Directed at Youths: Omaha Copies Boston Effort in Hopes of Reducing Gun Violence Among the Young*, OMAHA WOLRD-HERALD, Dec. 19, 1999, at B1; Donald G. Evans, *Project Spotlight -- Partnership in Supervision*, CORRECTIONS TODAY, Vol. 63, Feb. 1, 2001; Patricia Davis, *Police and Probation Officers Team Up to Keep Track*, WASHINGTON POST, Mar. 30, 2000, at V01; John Semien, *Probation Compliance Project Targets Youths*, COMMERCIAL APPEAL, Feb. 27, 1999, at B1; Paul Logan, *Boston Minister to Describe Crime-Fighting Ideas*, ALBUQUERQUE JOURNAL, Oct. 28, 1999, at B1; Peter Hermann, *Police Plan Clampdown on Baltimore Youth Gangs; No-Nonsense Initiative to Use Talk, Big Stick*, BALTIMORE SUN, Jan. 23, 1998, at A1; Amy Wolfford, *Police Turn Up the Heat on Streets: The Violent Crime Task Force Sweeps East Greensboro Neighborhoods To Make Arrests and Ask Residents for their Help*, GREENSBORO NEWS & RECORD, May 5, 2000, at B1; Christine Vendel & Anne Lamoy, *Murder Rate Falls in Both Kansas Citys*, Kansas City Star, Jan. 3, 2000, at B1; Angela Moore, *Firehouse Cops Focus on Repeat Offenders*, ST. PETERSBURG TIMES, June 16, 1998, at B3; James H. Burnett, *Ceasefire Celebrates First-Year Successes*, MILWAUKEE JOURNAL SENTINEL, Jan. 26, 2001, at B5.

ensure that an offender's terms of release into the community are being followed. These programs are also copying Boston's success. Various intensive supervision programs in Kansas City, including an Operation Night Light, are credited with a twenty-four percent drop in the murder rate and the lowest number of homicides, 47, in that city in a decade.[43] In many cases, these programs have obtained immediate positive results -- Milwaukee's implementation of Operation Ceasefire caused a drop in the city's homicide rates after only a year of operation.[44] Warrantless, suspicionless home searches are not only rationally related to the legitimate interests of these community supervision programs, they are a fundamental component of many successful programs.

Addressing *Turner's* second factor, there are no easy alternatives to a warrantless, suspicionless search for determining many types of violations of supervision conditions. As the Colorado Supreme Court recognized in upholding warrantless, suspicionless searches of probationers' or parolees' homes:

> The ability to conduct surprise searches . . . even without specific reason to believe that the parolee [or probationer] has committed a violation, serves as a powerful deterrent to parole violations and as an invaluable aid in the [ ] officer's efforts to assist in the [supervisee's] rehabilitation.[45]

Numerous other courts have agreed with this assessment.[46] As the New Hampshire Supreme Court has stated, "simply

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43 *See* Vendel & Lamoy, *supra* note 42, at B1.

44 *See* Burnett, *supra* note 42, at B5.

45 *People v. McCullough*, 6 P.3d 774, 780 (Colo. 2000) (*en banc*).

46 *See People v. Reyes*, 968 P.2d 445, 450-51 (Cal. 1998) (random searches effectively enable probation system to monitor and deter crime); *State v. Zeta Chi Fraternity*, 696 A.2d 530, 541 (N.H. 1997)

monitoring the probationer's progress from a distance" may result in the probationer or parolee "successfully conceal[ing] evidence of ongoing criminality or violations of probation conditions so that the probation officer has no suspicion of misconduct."[47]

Courts have allowed warrantless, suspicionless searches because they understood that community supervision programs must be given the necessary resources to carry out their monitoring responsibilities.[48] The most successful tool utilized by community supervision programs is the warrantless, suspicionless search. As discussed above, the effectiveness of programs utilizing these searches is unquestionable. Under Texas' Project Spotlight, home searches uncovered 87 weapons in a single county.[49] The High Point, North Carolina Violent Crime Task Force credits home visits to high-risk offenders for the city's drop in homicides from 16 in 1997 to 5 in 1999.[50] Simply put, there is no way to replace this "invaluable aid" to community supervision.

(unannounced searches effective in deterring crime); *State v. Smith*, 589 N.W.2d 546, 549 (N.D. 1999) (goals of probation system "justify departure from the usual warrant and probable cause requirements" for home search); *State v. Davis*, 577 N.W.2d 763, 800 (Neb. Ct. App. 1998) (parole system's ability to make unannounced searches allows effective monitoring of parolees); *People v. Eiland*, 576 N.E.2d 1185, 1190 (Ill. App. Ct. 1991) (probation system "must" be allowed to intervene with "lesser degree of certainty than the fourth amendment would otherwise require" in order to properly monitor probationers); *Latta v. Fitzharris*, 521 F.2d 246, 250 (9th Cir. 1975) (*en banc*) ("impossible" to determine a parolee's conduct without conducting home searches).

47 *Zeta Chi*, 696 A.2d at 539.

48 *See* cases *supra* n.46.

49 *See* Evans, *supra* n.42.

50 *See* Wolfford, *supra* n.42, at B1.

With respect to the third factor articulated in *Turner*, not allowing warrantless, suspicionless searches will have an adverse impact on parole and probation systems around the country. The National Institute of Justice of the United States Department of Justice recently published a landmark study of crime prevention initiatives in the United States which found that "opportunity reduction" measures, including increased police presence and monitoring and intensive supervision, were common aspects of successful crime prevention programs. The study found that "[w]hile most [intensive supervision] efforts are far from the headlines and newscasts, they appear to be quietly transforming America into an effective, efficient crime preventing and controlling society. It is these crimes prevented that are reflected in statistics as non-events – thus lowering overall crime rates."[51] Warrantless, suspicionless searches are a fundamental part of community supervision programs.[52] A limitation or the ability of community supervision programs to engage in intensive supervision would threaten the tremendous crime prevention gains they have made.

The final *Turner* factor, whether alternative means for exercising the right remain open to the community supervisee, is difficult to apply in the Fourth Amendment context because the constitutional right provides that a person cannot be searched in certain circumstances. This means that it is unlikely that a person does not have an alternative method of exercising a Fourth Amendment right when officials need to conduct a search in a particular manner.[53]

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51 Gene Stephens, *Proactive Policing: The Key to Successful Crime Prevention and Control*, USA TODAY, May 1, 2001.

52 *See* pp. 17-18, *supra*.

53 *See Thompson*, 111 F.3d at 699 ("[T]he second Turner factor -- availability of other avenues for exercising the right infringed upon -- is much more meaningful in the [F]irst [A]mendment context than the

Nonetheless, as long as a warrantless, suspicionless search is pursuant to and part of a valid community supervision system, overall consideration of the four factors indicates that the search is reasonably related to legitimate parole interests.[54]

C. The Warrantless, Suspicionless Search of Knights' Residence Satisfies the Legitimate Interests Test.

We now apply the legitimate interests test described above to the search of Knights' residence to demonstrate that the search did not violate his Fourth Amendment rights. The search of Knights' residence by the Napa County Sheriff's Department was pursuant to a policy of the California probation system, as established by the California legislature. The California legislature authorized both the inclusion of the search consent as a condition of the terms of Knights' probation and, by implication, the warrantless, suspicionless search of Knights' residence.[55] Pursuant to this authority,

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[F]ourth or [E]ighth, where the right is to be free from a particular wrong.") (quoting *Michenfelder v. Sumner*, 860 F.2d 328, 331 n.1 (9th Cir. 1988)).

[54] Not every type of search conducted pursuant to a community supervision policy will meet the legitimate interests test. Courts have cautioned that "arbitrary, capricious, or harassing" searches may be unreasonable, and will infringe even on the "greatly reduced" privacy interest of a probationer or parolee. *See People v. McCullough*, 6 P.3d 774, 782 (Colo. 2000) (*en banc*); *People v. Reyes*, 968 P.2d 445, 451 (1998). *See also Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987) (probationers have lesser expectation of privacy than the public at large). Modern community supervision programs, however, usually have the flexibility needed to avoid such searches.

[55] The applicable California statute states that the sentencing court may impose "reasonable conditions" to facilitate the "reformation and rehabilitation of the probationer." Cal. Penal Code § 1203.1(j) (West 2001).

Knights was required to consent to warrantless, suspicionless searches as a condition of his probation.

The decision to create a probation condition allowing for warrantless, suspicionless searches is exactly the type of policy decision that should be entitled to deference under the legitimate interests test. As explained in Section I(B), a warrantless, suspicionless search of a probationer or parolee conducted pursuant to a probationary policy or regulation is reasonably related to the legitimate interests of a probationary system. There is nothing in the record to indicate that the search of Knights' residence, which was conducted pursuant to an active police investigation, was arbitrary, capricious, or harassing. Accordingly, the search of Knights' residence satisfied these requirements, was reasonable, and did not violate the Fourth Amendment.

II. EVEN IF THE COURT DOES NOT ADOPT THE LEGITIMATE INTERESTS TEST, THE SEARCH OF KNIGHTS' RESIDENCE WAS REASONABLE UNDER THE FOURTH AMENDMENT.

Even if the Court declines to adopt the legitimate interests test, it still should find that the search of Knights' residence pursuant to his search consent was constitutional under *Griffin*'s balancing test. For the reasons discussed in Section I of this brief, the state's need for effective methods to solve the problems of community supervision far outweighs the limited expectation of privacy held by probationers and parolees. Consent searches without reasonable suspicion satisfy the reasonableness requirement of the Fourth Amendment in the context of community supervision, even if the legitimate interests test is not applied in this case. We defer to the fuller discussion of this argument and related points in the brief of the United States.

CONCLUSION

For the foregoing reasons, the Court should decide that the search of Knights' residence did not violate his Fourth Amendment rights. It therefore should reverse the decision of the Ninth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

PARTIAL LIST OF PROGRAMS INSPIRED BY THE BOSTON PLAN

1. **Omaha, Ne. Operation Ceasefire**
   Started in August 1999, the program utilizes teams of probation, police and parole officers to closely monitor high-crime neighborhoods and the hangouts of suspects in order to combat gun violence. The teams both conduct searches and execute warrants.[1]

2. **Omaha, Ne. Operation Night Light**
   Teams of two police officers and a probation or police officer visit the homes of violent and at-risk offenders to ensure they are following the terms of their parole or probation. The teams have the right to conduct warrantless searches if such searches are a part of the terms of the youth's probation. If a violation is found, a number of sanctions are used, ranging from stricter curfews and increased drug testing to a revocation of parole or probation.[2]

3. **Omaha, Ne. Project Impact**
   Under Project Impact, which was launched in December 1999, police and probation officers make unannounced visits to the homes of youths on probation or parole, closely monitor gang members, and join with community groups to offer educational and employment

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1 Tanya Eiserer, Project Directed at Youths: Omaha Copies Boston Effort in Hopes of Reducing Gun Violence among the Young, OMAHA WORLD-HERALD, Dec. 19, 1999, at B1.

2 *Id.*

alternatives to youths.[3] A series of drive-by shootings in May 2000 led to increased neighborhood sweeps and police presence, and the formation of a South Omaha Project Impact Team.[4]

4. **Texas Project Spotlight**
Instituted in seven counties, the Project embraces supervising probationers in the community and enforcing probation conditions through partnerships between police and community agencies. Teams of three individuals from various public agencies provide intense supervision through day, evening and weekend visits to probationers' homes, schools, and places of employment. Educational and employment services are also provided.[5]

5. **Providence, R.I. Safe Streets**
Modeled after Operation Night Light, Safe Streets represents Providence's attempt to implement a five-year plan to overhaul its probation system. Since 1995, repeat offenders have committed more than 1,400 crimes in Rhode Island, and almost half of the people on probation, approximately 11,000 offenders, do not have even cursory checks with a probation officer as a term of their probation. There is little to no supervision of probationers to ensure that they are attending mandated counseling sessions and meetings with probation counselors, or to follow up if probationers do fail to appear. Safe Streets involves probation counselors

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3 *Id.*

4 Tanya Eiserer, *Beefed-Up Patrols Target Recent Violence*, OMAHA WORLD-HERALD, May 6, 2000, at 17.

5 Donald G. Evans, *Project Spotlight – Partnership in Supervision*, CORRECTIONS TODAY, Vol. 63, Feb. 1, 2001.

riding with police officers to more closely monitor high-risk offenders at their homes and hangouts. [6]

6. **Arlington, Va. Police and Probation Co-operation**
In March 1998, Arlington County's police department and probation office partnered to more closely supervise probationers by visiting their homes and job sites. Of the 42 probation offices in Virginia, 22 have started some form of community-oriented probation and parole services, each tailored to the specific needs of the community but intended to provide a bridge between the police and probation offices for better monitoring of parolees and probationers.[7]

7. **Memphis, Tn. Operation Night Light**
Created in 1999 by the state Department of Probation, the Shelby County Sheriff's Office and the Memphis Police Department, the program matches two-person teams of probation and police officers who make nightly visits to up to 15 probationers suspected of non-compliance with the terms of their probation.[8]

8. **Albuquerque, N.M. Operation Night Light**
Started in 1999 by the city's Metropolitan Criminal Justice Coordinating Council, this program pairs sheriff's deputies with juvenile probation officers in order to surveille juvenile offenders who are under

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6 Gerald M. Carbone & David Herzog, *Overwhelmed: Many Criminals Go Unsupervised as Caseloads Crush Probation System*, PROVIDENCE JOURNAL, Mar. 4, 2001, at A1.

7 Patricia Davis, *Police and Probation Officers Team Up to Keep Track*, WASHINGTON POST, Mar. 30, 2000, at V01.

8 John Semien, *Probation Compliance Project Targets Youths*, COMMERCIAL APPEAL, Feb. 27, 1999, at B1.

curfew or on probation in order to keep them from "falling through the system's cracks."[9]

9. Baltimore, Md. Operation Safe Neighborhoods

Federal, state, and community agencies review case files and target repeat offenders who will be closely monitored for any violation of their parole or probation. Officials also meet with the parolees and probationers to inform them that any violations of their parole or probation, even minor, will result in long prison sentences and to inform them of counseling options.[10] Police target groups suspected of violence for special attention, ranging from daily visits to sustained misdemeanor arrests. Officials use a close relationship between police and prison officials to seek out juvenile offenders to monitor juvenile offenders in their homes, at their schools, and at hang-outs in order to ensure that they are complying with the terms of their parole or probation.[11]

10. Greensboro, N.C. Violent Crime Task Force

Created in 1999, the task force seeks to combine prevention, enforcement, and community services in a way that will reduce crime rates. In May 2000, the task force executed its first neighborhood sweep. For two days local, federal, and state probation and police officers joined forces to patrol neighborhoods, visiting

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9 Paul Logan, *Boston Minister to Describe Crime-Fighting Ideas*, ALBUQUERQUE JOURNAL, Oct. 28, 1999, at B1.

10 Sheila Hotchkin, *Officials: Violence Will not be Tolerated in Park Heights*, ASSOCIATED PRESS NEWSWIRES, Apr. 25, 2000.

11 Peter Hermann, Police Plan Clampdown on Baltimore Youth Gangs; No-Nonsense Initiative to Use Talk, Big Stick, BALTIMORE SUN, Jan. 23, 1998, at A1.

high-risk offenders, making arrests, and asking residents for their help in monitoring probationers and parolees in the future.[12]

11. High Point, N.C. Violent Crime Task Force

Started by Police Chief Louis Quijas, the task force is similar to the Greensboro task force. Since it's inception, homicides in High Point have dropped from 16 in 1997 to 14 in 1998 to 5 in 1999.[13]

12. Brooklyn, N.Y. Adoption of the "Boston Plan"

In October 1999, after six years of a reduction in crime, crime rates rose in Brooklyn and prompted city, state, and federal crime-fighting authorities to implement many of the measures used to fight crime in Boston. These included more systematic coordination among police, probation officers and community groups to monitor gang members, parolees, and probationers. Officials also meet with gang members to inform them that increased monitoring will occur and to present alternatives to violence. Those who do not attend meetings are considered to be in violation of their parole or probation.[14]

13. Kansas City, Mo. Operation Night Light

Between 1998 and 1999, Kansas City's murder rate dropped 24% and the number of homicides, 47, was the

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12 Amy Wolfford, Police Turn Up the Heat on Streets The Violent Crime Task Force Sweeps East Greensboro Neighborhoods To Make Arrests and Ask Residents for their Help, GREENSBORO NEWS & RECORD, May 5, 1000, at A1.

13 *Id.*

14 Fred Kaplan, *Brooklyn Adopts 'Boston Plan' on Slayings*, BOSTON GLOBE, Oct. 14, 1999, at A14.

lowest in a decade. The implementation of various intensive supervision programs, including Operation Night Light, is credited with the drop in homicides. Teams of police and probation officers focus their monitoring efforts on first-time young offenders in the hopes of preventing repeat offenses.[15]

14. Tampa, Fl. Operation Night Light

Tampa's plan meshes police officers, probation officers, and neighborhood watch programs in order to surveille repeat offenders. The program expands an earlier program in which a police officer was placed in each neighborhood fire station in the city. These officers identify repeat and high-risk offenders in the community, then meet with neighborhood watch programs to share photos, case histories, and addresses of known felons. A bulletin board in each neighborhood fire station also lists information on high-risk offenders recently released into each neighborhood.[16]

15. Allentown, Pa. Ride Along Program

Started in March 2000, at least one weekend night a month probation officers accompany police as they patrol bars and other hangouts looking for individuals violating their parole or probation. The program was started because of persistent violence and homicides outside Allentown bars; in each homicide that occurred outside a bar in Allentown since 1995 either the victim or assailant was on parole. In its first year, the program was responsible for the arrests of 45 probation or parole violators and resulted in no shootings or homicides

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15 Christine Vendel & Anne Lamoy, *Murder Rate Falls in Both Kansas Citys*, KANSAS CITY STAR, Jan. 3, 2000, B1.

16 Angela Moore, *Firehouse Cops Focus on Repeat Offenders*, ST. PETERSBURG TIMES, June 16, 1998, at B3.

outside Allentown bars. While most Pennsylvania counties do not allow probation officers to ride with police, plans have begun to imitate the program in some counties.[17]

16. Milwaukee, Wi. Operation Ceasefire

Milwaukee's Operation Ceasefire was started in January 2000, with its roots directly in the Boston and Richmond programs. In April 2000, Milwaukee police and various clergymen met and decided to send representatives to Boston to study all aspects of that city's plan.[18] Milwaukee's plan involves a joint federal-state-local task force, which pursues and prosecutes illegal gun use and possession. In its first year, Operation Ceasefire led to the prosecution of 684 people, homicide dropped two percent, and homicides with a gun dropped nine percent.[19]

17. Milwaukee, Wi. Community Safety Coalition

The Coalition is part of Milwaukee's Operation Ceasefire program. The Coalition organizes meetings in which prominent law enforcement and other city officials to confront high-risk parolees and probationers

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17 Keith Herbert, The Fast Round-Up: Police and County Officers Swoop into Allentown Bars on Weekend Nights Looking for Probation Violators. It Takes Only Minutes to Get their Man, ALLENTOWN MORNING CALL, Mar. 11, 2001, at A1.

18 James H. Burnett, *Police-Clergy Partnership Finding Other Anti-Crime Collaborators*, MILWAUKEE JOURNAL SENTINEL, Apr. 15, 2000, at B5.

19 James H. Burnett, *Ceasefire Celebrates First-Year Successes*, MILWAUKEE JOURNAL SENTINEL, Jan. 26, 2001, at B5.

with their behavior and assist them with job placement, educational options, and drug counseling.[20]

18. Chicago, Il. Project for Violence Prevention

The Project was created by Gary Slutkin, a public-health professor at the University of Illinois. By September 2000, more than 125 religious leaders had joined the Project in an attempt to counsel youth and work with police to monitor chronic troublemakers in their neighborhoods.[21]

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[20] Jessica McBride, *Telling it Straight*, MILWAUKEE JOURNAL SENTINEL, Mar. 22, 2001, at B1.

[21] Mary Cagney, *Pastors Work with Police to End Gun Violence*, CHRISTIANITY TODAY, Sept. 4, 2000, at 34.

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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

vs.

MARK JAMES KNIGHTS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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37 pp

QUESTION PRESENTED

Can a law enforcement officer conduct a warrantless search supported by reasonable suspicion of a probationer's apartment when that probationer has consented to a probation condition authorizing any law enforcement officer to search his person or premises without a warrant or individualized suspicion?

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IN THE

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Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

Probation is an important but risky part of the criminal justice system. While society can reap significant economic and rehabilitative gains from probation, allowing convicted criminals to serve their sentence in society instead of prison

1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

threatens public safety. Probation search conditions play an important role in limiting probation's danger to society by deterring probationers from committing crimes. The Ninth Circuit's refusal to allow police to conduct such searches threatens the integrity of this key component of many probation systems, contrary to the rights of victims and society which CJLF was formed to advance.

SUMMARY OF FACTS AND CASE

Between 1996 and 1998 the facilities of the Pacific Gas and Electric Company (PG & E) in Napa County were vandalized over 30 times. *United States* v. *Knights*, 219 F. 3d 1138, 1140 (CA9 2000). Suspicion centered on Mark James Knights and his friend Steven Simoneau. The vandalism began after Knights' electrical service was discontinued, and the incidents coincided with his court appearances over his theft of power from PG&E. *Ibid.*

The sheriff's department set up surveillance of Knights' apartment on June 3, 1998. About 3:10 a.m., Simoneau was observed leaving the apartment, carrying what appeared to be three pipe bombs. He then crossed the street to the Napa River, where he deposited these objects. See *ibid.* As Simoneau left in his truck, Detective Todd Hancock of the Napa County Sheriff's Department followed him until he stopped in a driveway. *Ibid.* At this point, Hancock was able to examine the truck out of Simoneau's presence. In and around the truck, Detective Hancock found a Molotov cocktail, explosive materials, a gasoline can, and two brass padlocks, which fit the description of the locks removed from the vault of a transformer that was recently vandalized. *Ibid.* "The truck was seized, impounded, and later searched pursuant to a warrant." *Ibid.*

Detective Hancock knew that Knights was on probation for a misdemeanor drug offense and that one condition of the probation was to"[s]ubmit his . . . person, property, place of residence, vehicle, personal effects, to search at any time, with

or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer." *Id.*, at 1140-1141. After securing permission from his supervisor, Detective Hancock conducted a warrantless search of Knights' apartment. The search "turned up detonation cord, ammunition, unidentified liquid chemicals, instruction manuals on chemistry and electrical circuitry, bolt cutters, telephone pole-climbing spurs, drug paraphernalia, photographs and blueprints stolen from the burglarized building, and a brass padlock stamped PG & E." *Id.*, at 1141.

Knights was indicted in federal court "for conspiracy to commit arson, for possession of an unregistered destructive device, and for being a felon in possession of ammunition." *Ibid.* See 18 U. S. C. §§ 371, 922(g); 26 U. S. C. § 5861(g). The District Court suppressed the evidence seized from Knights' apartment, holding that the "probation search was really a subterfuge for an investigative search . . . . " *Knights*, 219 F. 3d, at 1141. The Ninth Circuit upheld the District Court's holding. See *id.*, at 1145. Certiorari was granted on May 14, 2001.

SUMMARY OF ARGUMENT

Public safety is the Achilles' heel of any probation system. While society can reap substantial benefits from this less costly and more rehabilitative alternative to prison, having convicted criminals serve their sentence in society gambles with public safety. A probation system that cannot protect the public will lose support.

The threat to public safety from felony and drug using probationers is all too real. Studies of felony probationers show a recidivism rate that is between six to nineteen times the arrest rate for the general population. As of 1991, 23% of all state prisoners were probation violators, and 87% of the probation violators had been arrested for a new offense. Probationers

were thus responsible for at least six thousand murders and tens of thousands of other serious felonies.

Allowing police to conduct probation searches can help deal with this problem. Having more officers available for searching supplements the resources of habitually understaffed probation departments. Police are also better trained and more experienced at conducting searches than probation officers. This will make probation searches both more likely and more effective, which further deters probationer crime. In addition to protecting the public, this will also aid in the probationer's rehabilitation.

The threat to public safety posed by probation creates a special need for extending the authority to conduct probation searches to police officers. Certain threats to public safety create special needs for dispensing with the Fourth Amendment's warrant and probable cause requirements. The fact that the particular public safety interest is related to crime prevention does not disqualify it from special needs status, as is demonstrated by airport checkpoints.

The search in this case compares favorably to airport checkpoints. Both searches involve consent, while there has been far more probationer crime than airplane terrorism. Most airplane passengers are law-abiding citizens, while all probationers are convicted criminals, hence the search in this case stands on at least as good of a footing as these airport searches.

The Ninth Circuit improperly examined the motive of the searching officer in this case. Although it framed the issue in terms of the probationers' consent, striking down a search based on a searching officer's investigatory purpose is an inquiry into his motive. Whether a particular type of search serves a special need is fair game; the motive of the officer conducting the search is not. Since the public safety special need was valid, the fact that the searching officer was not concerned with the probationer's rehabilitation is irrelevant. Any other result

would be impractical, as ascertaining subjective intent is not worth the effort in Fourth Amendment cases.

Allowing police officers to enforce the search condition does not violate the defendant's reasonable expectation of privacy. Unlike the probationer in *Griffin* v. *Wisconsin*, 483 U. S. 868 (1987), Knights consented to his search condition. At the very least, this substantially reduces his already limited expectation of privacy. The fact that prison is the alternative to probation does not eliminate the consent. A difficult choice is still a choice. What matters is not the harshness of the prison sentence, but the comparative lenience of the probation alternative offered by the state.

There is no right to probation. If the state can deprive a defendant of all Fourth Amendment rights through a prison sentence, then the much lesser Fourth Amendment deprivation found in this case must also be reasonable. Balancing the defendant's minimal privacy interests against society's considerable interest in protecting the public from probationers justifies the search in this case.

ARGUMENT

The Ninth Circuit's decision in this case paints the probation search of Knights' apartment as part of modern society's "relentless assault" on privacy. See *United States* v. *Knights*, 219 F. 3d 1138, 1144 (CA9 2000). It condemns this search and the California Supreme Court's decisions upholding such searches in unusually strong language:

> "In making this decision we need not rely on some resident numen or wait for Fulgora to light our way. We can, instead, rely upon the wisdom of the ages and upon the sagacity of the numerous Ninth Circuit judges who have written before us. If we do not heed all of that history and learning, who will?" *Id.*, at 1145.

Reality is much more prosaic. The probation search in this case is at most a minor extension of *Griffin* v. *Wisconsin*, 483 U. S. 868 (1987). Since the probationer in this case consented to the search condition, the search here intrudes less upon a probationer's privacy than the unconsented condition upheld in *Griffin*. As the danger to public safety posed by probationers like the defendant creates a special need, a warrantless search by a police officer pursuant to a valid probation condition is reasonable without regard to the search's alleged investigatory purpose.

I. The threat to public safety from probationers creates a special need for extending the authority to conduct probation searches to police officers.

The Ninth Circuit dismissed Detective Hancock's search of Knights' apartment because it was not "conducted for probation purposes" but rather "as a mere subterfuge for the pursuit of [a] criminal investigation[ ]." *United States* v. *Knights*, 219 F. 3d 1138, 1145 (CA9 2000). This holding rests on two mistaken premises. One premise, that a court may examine the individual motivation of an officer conducting a special needs search, is addressed in part II. The other mistake is separating public safety from probation's purpose. Maintaining public safety is an essential part of any probation system. See, *e.g.*, *Griffin* v. *Wisconsin*, 483 U. S. 868, 875 (1987); 18 U. S. C. §§ 3562(a), 3553(a)(2)(C); *People* v. *Carbajal*, 10 Cal. 4th 1114, 1120, 899 P. 2d 67, 70 (1995); Cal. Penal Code § 1202.7. While *Griffin* relied on both public safety and rehabilitation to support a special needs finding, see 483 U. S., at 875, the special threats to public safety posed by probationers is sufficient on its own to justify warrantless searches by police officers under certain circumstances.

Those circumstances were met in this case. Knights, a drug offender with a prior felony conviction, consented to a valid search condition. See *supra*, at 2. As in *Griffin*, the search in

this case was supported by reasonable suspicion. See *supra*, at 2. The only difference between this search and the one in *Griffin* that could favor the defendant's case is that the search was conducted by a police officer rather than a probation officer. Since protecting public safety from probationers is a special need itself, that distinction has no constitutional significance.

A. The Threat.

Probation systems must place public safety before any other interest. While society may benefit from employing the cheaper and potentially more rehabilitative probation instead of prison, probation gambles with public safety. Anyone who is eligible for probation has already demonstrated an unwillingness to conform to the law. See *Griffin*, 483 U. S., at 880. Probationers are thus a far greater threat to commit crime than the law-abiding citizens with whom they share freedom. If probation cannot protect the public, public support for it will erode. See Petersilia, Probation in the United States: Practices and Challenges, National Institute of Justice Journal 2, 2 (Sept. 1997) (cited below as "Probation in the United States").

Unfortunately, the threat to safety is all too real. While probation has not been researched as extensively as it should be, see Mackenzie et al., The Impact of Probation on the Criminal Activities of Offenders, 36 Journal of Research in Crime and Delinquency 423, 424 (1999), studies of probationer recidivism still show that probationers are responsible for a disturbingly large proportion of crimes.

These studies center on felony probationers. Typically, recidivism is calculated by counting the number of these probationers who have been arrested for a felony during the first three years of probation. See Benedict & Huff-Corzine, Return to the Scene of the Punishment: Recidivism of Adult Male Property Offenders on Felony Probation, 1986-1989, 34 Journal of Research in Crime and Delinquency 237, 238-239 (1997); Langan, Between Prison and Probation: Intermediate

Sanctions, 264 Science 791, 792 (May 6, 1994). Estimates of the recidivism rates for felony probationers range from 22% to 65%. See Benedict & Huff-Corzine, *supra*, at 238-239. Although the defendant in this case was on probation for a misdemeanor drug offense, see *supra*, at 2, all drug offenders run a substantial risk of recidivism. Indeed, drug use is the best predictor of whether someone will reoffend while on probation. See Mackenzie, *supra*, 36 Journal of Research in Crime and Delinquency, at 439 (Table); Benedict & Huff-Corzine, *supra*, at 245-246. Knights, who also had a prior felony conviction, see *supra*, at 7, was thus a clear risk to reoffend, as Detective Hancock's investigation confirmed.

Even at the lowest recidivism rate, probationers are much more dangerous to the community than the average citizen. If 22% of the general population were arrested for a felony over a three-year period, this country would be a prison camp. Arrest figures reinforce this common sense conclusion. Since several of the recidivism studies took place in the mid-1980's, see Benedict & Huff-Corzine, *supra*, at 238-239, *amicus* will use the 1986 arrest figures for the general population as a comparison figure. In 1986 the arrest rate for Federal Bureau of Investigation (FBI) "index" crimes (the combined arrest rates for 5 violent crimes and 4 property crimes) was 1,091.8 per 100,000 or 1.0918%. U. S. Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics 1987, p. 368 (1988). Assuming that no person is arrested for more than one index crime during any three-year period at the 1998 rates, the lowest estimated recidivism rate for probationers, 22%, would still be more than six times this hypothetical arrest rate for the general population, while the high rate of 65% recidivism is over nineteen times this arrest rate.

The FBI index is not an ideal for comparison, however, as it both includes nonfelonies and excludes felonies from its total. Thus the larcenies counted in the index include many misdemeanor larcenies such as shoplifting. See *id.*, at 563. Similarly, the crime index does not count felonies that do not fall

into the property or violence classifications, primarily drug and weapons offenses. See *id.*, at 368, 563. Since the drug and weapons arrest totals also do not distinguish between misdemeanors and felonies, adding drug and weapons offenses to the index crimes would create an excessively conservative figure, but one that is still far below the recidivism rate for felony probationers. The 1982 arrest rate per 100,000 population for drug offenses was 348.6 or 0.3486%, *id.*, at 368, and 80.7 per 100,000 or 0.087% for weapons offenses. *Ibid.* When added to the index rate of 1.0918%, this would give an annual arrest rate of 1.5274%. Over a three-year period the maximum arrest rate under this most conservative reasonable estimate would be 4.5822%, which is still less than one quarter of the lowest estimated recidivism rate for probationers, and one-fourteenth of the high rate.

The actual difference is undoubtedly much greater. First, each arrest in the FBI total does not involve a different person; some people will be arrested for more than one index crime during a year or over a three-year span. See *id.*, at 338, note. More importantly, the arrest rate for nonprobationers is actually lower than the total crime index because that index includes the arrests of probationers, who have a much higher arrest rate than the civilian population.

Probation's threat to public safety is underscored by the high proportion of state prisoners who were on probation at the time of their offense. As of 1991, 23% of all state prisoners were probation violators, see U. S. Dept. of Justice, Bureau of Justice Statistics, Probation and Parole Violators in State Prison, 1991, p. 3 (1995), and 87% of these probation violators had been arrested for a new offense. See *ibid.* "Based on the offense that brought them to prison, [in 1991] the 162,000 probation violators committed 6,400 murders, 7,400 rapes, 10,400 assaults, and 17,000 robberies, while under supervision in the community an average of 18 months." *Id.*, at 1. Because many crimes go unreported, see Mackenzie, *supra*, 36 Journal of Research in Crime and Delinquency, at 427, or unsolved,

these arrest figures understate the costs of probation. A ratio of 10 crimes committed to every arrest is considered "a conservative figure," Petersilia & Turner, Prison Versus Probation in California: Implications for Crime and Offender Recidivism, in Community Corrections: Probation, Parole, and Intermediate Sanctions 61, 65 (Petersilia ed. 1998). Therefore, the real cost of probation is much higher than the arrest records estimate.

This empirical evidence reinforces the common-sense conclusion that placing convicted criminals in society rather than prison is dangerous enough with adequate supervision, and intolerably dangerous without it. While not every probationer is equally dangerous, this defendant, with a prior felony and current drug conviction, posed a real risk of reoffending. This risk forms the basis of a special need that justifies the search in this case.

B. Policing the Bargain.

In California, as elsewhere, probation is "in effect, a bargain made by the People through the Legislature and the courts, with the convicted individual, whereby the latter is in essence told that if he complies with the requirements of probation, he may become reinstated as a law-abiding member of society." *People* v. *Chandler*, 203 Cal. App. 3d 782, 788, 250 Cal. Rptr. 730, 733 (1988). Both sides can benefit from the bargain. The defendant avoids prison and may have a better chance at rehabilitation, see Kim, An Econometric Study on the Deterrent Impact of Probation, 18 Evaluation Rev. 389, 390-391 (1994), while the state gets a less expensive alternative to prison, at least in direct costs. See Petersilia & Turner, *supra*, at 65.

A probationer who commits a crime breaks the bargain. See, *e.g.*, 18 U. S. C. § 3563(a)(1) (not committing crime a mandatory probation condition). Crime is a cost not found in most economic comparisons between probation and prison. While probation is not simply an economic issue, understanding its cost helps to determine whether society is getting the benefit of its bargain with probationers. This hidden cost of probationer crime makes it likely "that felony probation sentences are more expensive than is commonly assumed, both absolutely and relative to imprisonment . . . ." Petersilia & Turner, *supra*, at 65.

Search conditions can help to control the crime expense. They are "meant to assure that the probation serves as a period of genuine rehabilitation and that the community is not harmed by the probationers being at large." *Griffin*, 483 U. S., at 875. By dispensing with warrants, search conditions help the authorities respond more "quickly to evidence of misconduct," *id.*, at 876, and more importantly, help deter probationers from committing crimes. See *ibid.* Too many restrictions on the probation officer's ability to search the probationer "would reduce the deterrent effect of the supervisory arrangement. The probationer would be assured that so long as his illegal (and perhaps socially dangerous) activities were sufficiently concealed as to give rise to no more than reasonable suspicion, they would go undetected and uncorrected." *Id.*, at 875 (discussing probable cause requirement).

Allowing police to rely on search conditions can play an important role in minimizing probation's costs to society. Probation officers are not necessarily the ideal agents for deterring their clients through searches. The resources of probation departments are even more overstretched than other law enforcement agencies, with most probation officers carrying far larger caseloads than the ideal. See Probation in the United States, *supra*, at 3 (caseload of 258 per officer versus ideal of 30). Many probation officers are not well-equipped to conduct searches safely and efficiently. "Probation officers currently lack protective equipment. They have only minimal self-defense training, may not be armed, and are ill-equipped to conduct searches, as they possess little understanding of chain of custody procedures." Rackmill, Community Corrections and the Fourth Amendment, 57 Fed. Probation 40, 44 (Sept. 1993). Unsurprisingly, one survey of probation officers found them

very uncomfortable with the idea of searching their clients. See *ibid.*

Police can fill in these gaps. Their training makes them safer and more efficient at conducting searches. A probationer is less likely to be deterred by a search condition that can only be executed by an overworked probation officer. If this authority is supplemented by the more numerous and better trained police officers, then probationers are more likely to be searched, and therefore more deterred from committing crimes.

> "Being on parole with a consent-to-search condition is akin to sitting under the Sword of Damocles: With knowledge he may be subject to a search by law enforcement officers at any time, [the parolee] will be less inclined to have narcotics or dangerous drugs in his possession. *The purpose of an unexpected, unproved search of defendant is to ascertain whether he is complying with the terms of probation; to determine not only whether he disobeys the law, but also whether he obeys the law.* Information obtained under such circumstances would afford a valuable measure of the effectiveness of the supervision given the defendant and his amenability to rehabilitation." *State* v. *Benton*, 695 N. E. 2d 757, 761 (Ohio 1998) (emphasis in original; internal quotation marks omitted).

While police officers may not share the probation officer's interest in rehabilitation, cf. *Griffin*, *supra*, 483 U. S., at 876, this does not invalidate a search based upon the public safety special interest found in this case. The danger posed by probationer crime creates a special need separate from the rehabilitation aspect of *Griffin*. See part I C, *supra*. In any event, the deterrence and observation advanced by police searches would also help rehabilitate the probationer. Deterring crime can only help the rehabilitation process, as a probationer who commits crime is not rehabilitated.

If society cannot place an effective search condition upon probationers, then "the opportunity to choose probation might

well be denied to many felons by judges whose willingness to offer the defendant probation in lieu of prison is predicated upon knowledge that the defendant will be subject to search at any time for a proper probation or law enforcement purpose." *People* v. *Bravo*, 43 Cal. 3d 600, 609, 738 P. 2d 336, 341 (1987). Both probationers and society should be allowed to continue getting the benefit of the type of bargain found in this case.

C. Public Safety as a Special Need.

While allowing police to rely on probation search conditions certainly promotes public safety, see part I B, *supra*, the question remains as to whether this interest qualifies as a special need under the Fourth Amendment. The special needs that allow law enforcement to dispense with the warrant and lower the necessary suspicion must go beyond society's general interest in law enforcement. See, *e.g.*, *Skinner* v. *Railway Labor Executives' Assn.*, 489 U. S. 602, 619 (1989) (quoting *Griffin*, 483 U. S., at 873). Society's interest in protecting itself from the substantial dangers posed by higher risk probationers, like the defendant, satisfies this standard.

The legitimacy of this interest is found in *Griffin* itself. The *Griffin* Court noted that probation was like incarceration, a form of punishment for convicted criminals. See 483 U. S., at 874. Therefore probationers, like prisoners, "do not enjoy 'the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special [probation] restrictions.' " *Ibid.* (quoting *Morrissey* v. *Brewer*, 408 U. S. 471, 480 (1972)). The special needs in *Griffin* were the reasons for the limits on the probationer's liberty, making sure that "probation serves as a period of genuine rehabilitation and that the community is not harmed by the probationer's being at large." *Id.*, at 875.

Public safety can qualify as a special need without being attached to rehabilitating probationers. In other contexts, a sufficient threat to public safety supports special needs search-

es. Thus, drug testing of railway employees involved in certain train accidents was reasonable.

> "The Government's interest in regulating the conduct of railroad employees to ensure safety, like its supervision of probationers or regulated industries, or its operation of a government office, school, or prison, 'likewise presents "special needs" beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements.' " *Skinner*, 489 U. S., at 620 (quoting *Griffin*, 483 U. S., at 873-874).

Since the employees covered by the relevant regulations were "engaged in safety-sensitive tasks," 489 U. S., at 620, the threat to public safety of drug or alcohol impaired railroad employees created a special need for the drug testing requirement.

> "This governmental interest in ensuring the safety of the traveling public and of the employees themselves plainly justifies prohibiting covered employees from using alcohol or drugs on duty, or while subject to being called for duty. This interest also 'require[s] and justif[ies] the exercise of supervision to assure that the restrictions are in fact observed.' " *Skinner*, 489 U. S., at 621 (quoting *Griffin*, *supra*, 483 U. S., at 875).

The public safety interest in *Skinner* was fairly removed from law enforcement interests. Train accidents are not necessarily criminal acts, even if intoxication is involved, and this Court left undecided whether the routine use of the tests results in criminal cases would unconstitutionally subvert "the administrative nature of the FRA's program." 489 U. S., at 621, n. 5. But *Skinner* does not set the boundary of the public safety interest. Special public safety concerns that are much more congruent with law enforcement needs still qualify as special needs.

Griffin is one example. The proceeds of a search substantially justified by public safety were used in a criminal prosecution against the subject of the special needs search. See *Griffin*,

483 U. S., at 870. Indeed, the search condition was justified in part by the fact that sudden searches would deter probationers from committing crimes. See *id.*, at 876. Similarly, drunk driving roadblocks were upheld by this Court even though those who failed the sobriety tests would be arrested. See *Michigan Dept. of State Police* v. *Sitz*, 496 U. S. 444, 447 (1990).

Although the *Sitz* opinion did not clearly classify itself as a special needs case, subsequent analysis shows that its public safety rationale is closely allied to law enforcement interests.

> "This checkpoint program [in *Sitz*] was clearly aimed at reducing the immediate hazard posed by the presence of drunk drivers on the highways, and there was an obvious connection between the imperative of highway safety and the law enforcement practice at issue. The gravity of the drunk driving problem and the magnitude of the State's interest in getting drunk drivers off the road weighed heavily in our determination that the program was constitutional." *City of Indianapolis* v. *Edmond*, 531 U. S. 32, 148 L. Ed. 2d 333, 342, 121 S. Ct. 447, 453 (2000).

The roadblock in *Edmond* was struck down because its purpose, narcotics interdiction, was just part of a general interest in crime control. See *id.*, 148 L. Ed. 2d, at 344, 121 S. Ct., at 454. While narcotics are undoubtedly dangerous, it is a generalized danger with no particular ties to automobiles. "Only with respect to a smaller class of offenses, however, is society confronted with the type of *immediate vehicle-bound* threat to life and limb that the sobriety checkpoint in *Sitz* was designed to eliminate." *Id.*, 148 L. Ed. 2d, at 344, 121 S. Ct., at 455 (emphasis added).

The present case is more closely analogous to *Sitz* than *Edmond*. The search condition is limited to probationers, a group who presents a significant, special threat to public safety. See part I A, *supra*. There was no logical limit to the roadblock in *Edmond*; if it was upheld, "the Fourth Amendment would do little to prevent such intrusions from becoming a routine part of

American life." *Id.*, 148 L. Ed. 2d, at 344, 121 S. Ct., at 454. The logic of probation searches is much more limited, extending no further than parolees. The limited, special need in this case is not diminished by *Edmond*.

An interest is not disqualified from being special if it is related to crime prevention. If there is something about a particular situation or relationship that makes it unusually dangerous to public safety, then a special needs search may be justified. "[W]here the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as 'reasonable'—for example, searches now routine at airports, and at entrances to courts and other buildings." *Chandler* v. *Miller*, 520 U. S. 305, 323 (1997).

This is illustrated by the purest public safety special needs search, airport checkpoints. Millions of innocent individuals are subjected to electronic intrusions upon "their persons . . . and effects," cf. U. S. Const., Amdt. 4, simply because the threat to public safety from terrorism in airplanes made any other response unreasonable.

> " 'When the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, the danger *alone* meets the test of reasonableness, so long as the search is conducted in good faith for the purpose of preventing hijacking or like damage and with reasonable scope and the passenger has been given advance notice of his liability to such a search so that he can avoid it by choosing not to travel by air.' " *United States* v. *Edwards*, 498 F. 2d 496, 500 (CA2 1974) (emphasis added by *Edwards* Court) (quoting *United States* v. *Bell*, 464 F. 2d 667, 675 (CA2 1972) (Friendly, J., concurring)) (Friendly, J.); accord, *Treasury Employees* v. *Von Raab*, 489 U. S. 656, 675, n. 3 (1989).

The public safety probation search in this case compares favorably to the airport searches. Like the airport searches, the probation search condition is consensual. See *infra*, at 23-26.

Probation also presents an unusual danger to public safety, releasing into society an individual who "is more likely than the ordinary citizen to violate the law." *Griffin*, 483 U. S., at 880. It is a danger that is all too real in comparison to airline terrorism.

While the airline searches have helped to ensure that there have been comparatively few incidents of air piracy, see *Von Raab*, 489 U. S., at 675-676, n. 3, probation-related crime remains a significant blight upon society. The 6,000 or so killed by probationers each year, see *supra*, at 9, easily exceeds all deaths by airline piracy in or against this country. When the hundreds of thousands of other felonies committed by probationers are taken into account, see *supra*, at 9, the threat posed by probationers is at least equal to the threats that have justified billions of searches of innocent travelers at this country's airports. See *ibid.* It is "a concrete danger demanding departure from the Fourth Amendment's main rule." Cf. *Chandler*, 520 U. S., at 319.

The search condition in this case invaded no innocent privacy. Knights, an ex-felon with a drug conviction, consented to the search condition, including the provision that he could be searched by any law enforcement officer. See *supra*, at 2. Given the considerable danger posed by Knights and his ilk, California had a special need to allow Detective Hancock to rely on this probation condition.

II. The searching officer's motive for conducting the search is irrelevant to its constitutionality.

In addition to ignoring the public safety special need, the Ninth Circuit's decision also improperly relied on Detective Hancock's alleged motivation for searching Knights' apartment. The Ninth Circuit asserts that its decision is not based upon the motivation behind the search, but "rather, whether, without another basis for a warrantless home search, there was

consent to search in the first place." *United States* v. *Knights*, 219 F. 3d 1138, 1143 (CA9 2000). This distinction cannot carry the analytical load that the circuit court gives it. Knights did in fact consent to warrantless, suspicionless searches of his "place of residence . . . by any probation officer or law enforcement officer." *Id.*, at 1141. The Ninth Circuit limited the scope of Knights' consent, holding that "we have made it clear that his consent must be seen as limited to probation searches, and must stop short of investigative searches. We simply have refused to recognize the viability of a more expansive probationary consent to search term." *Id.*, at 1142. This is no more than an inquiry into the motive of the searching officer.

The manner in which the court found the improper investigatory purpose shows that this looks into the searching officer's state of mind:

> "Detective Hancock, and his cohorts, were not a bit *interested* in Knights' rehabilitation. They were *interested* in investigating and ending the string of crimes of which Knights was thought to be the perpetrator. . . . True, a probation officer may also *wish* to end wrongdoing by a probationer, but there was no 'also' about Detective Hancock's purpose." *Id.*, at 1143 (emphasis added).

Quoting another Ninth Circuit opinion, the court reiterated, " 'Because the search here clearly was not a genuine attempt to enforce probation but apparently had a *motive* of avoidance of Fourth Amendment requirements, it is the type of law enforcement conduct that ought to be deterred.' " *Id.*, at 1142 (emphasis added) (quoting *United States* v. *Merchant*, 760 F. 2d 963, 969 (CA9 1985)).

Motive has little place in Fourth Amendment analysis. This Court has repeatedly declined to invalidate an objectively legal search on the basis of the searching officer's allegedly improper motivations. In *Maryland* v. *Macon*, 472 U. S. 463 (1985), an undercover officer purchased two obscene magazines from an adult bookstore with marked money to facilitate an arrest and

prosecution for selling obscene materials. See *id.*, at 465-466. The fact that the officer intended to recover the marked money did not transform the purchase into a warrantless search. "Objectively viewed, the transaction was a sale in the ordinary course of business. The sale is not retrospectively transformed into a warrantless seizure by virtue of the officer's subjective intent to retrieve the purchase money to use as evidence." *Id.*, at 471.

As this Court emphasized in a plain view doctrine case,

> "evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer. The fact that an officer is interested in an item of evidence and fully expects to find it in the course of a search should not invalidate its seizure if the search is confined in area and duration by the terms of the warrant or valid exception to the warrant requirement." *Horton* v. *California*, 496 U. S. 128, 138 (1990).

Special needs searches present a more complex version of the general rule. This Court has noted that "an inventory search must not be a ruse for general rummaging in order to discover evidence." *Florida* v. *Wells*, 495 U. S. 1, 4 (1990). Similarly, in upholding a warrantless administrative inspection, this Court observed that the search did not seem to be "a 'pretext' for obtaining evidence of respondent's violation of the penal laws." *New York* v. *Burger*, 482 U. S. 691, 716-717, n. 27 (1987).

These statements do not give courts license to second-guess the motives of officers making special needs searches. Instead, these "quoted statements simply explain that the exemption from the need for probable cause (and warrant), which is accorded to searches made for the purpose of inventory or administrative regulation, is not accorded to searches that are *not* made for those purposes." *Whren* v. *United States*, 517 U. S. 806, 811 (1996) (emphasis in original). Therefore, "our cases dealing with intrusion that occur pursuant to a general

scheme absent individualized suspicion have often required an inquiry into purpose at the programmatic level." *City of Indianapolis* v. *Edmond*, 531 U. S. 32, 148 L. Ed. 2d 333, 346, 121 S. Ct. 447, 457 (2000).

In other words, the need behind a special needs search must actually be special, and the search must advance those needs. Since the primary purpose of the checkpoint at issue in *Edmond* was interdicting narcotics, which is no more than a " 'general interest in crime control,' " the checkpoint was invalid. See *id.*, at 345, 121 S. Ct., at 455 (quoting *Delaware* v. *Prouse*, 440 U. S. 648, 659, n. 19 (1979)). Had the program instead been supported by a special need like deterring drunk driving, or policing the borders on checkpoints, it would have been upheld. See *id.*, at 344, 121 S. Ct., at 454-455.

This narrow exception does not allow courts to peer into the minds of the officers executing a special needs search. "Finally, we caution that the purpose inquiry is in this context to be conducted only at the programmatic level and is not an invitation to probe the minds of individual officers acting at the scene." *Id.*, at 347, 121 S. Ct., at 457. So long as the "programmatic purpose," or special need, is valid, then search pursuant to that need is legal.

Allowing police officers to execute probation searches advances the public safety special need brought about whenever a felon, drug offender, or other high-risk individual is granted probation. See part I, *supra*. The fact that "Detective Hancock, and his cohorts, were not a bit interested in Knights' rehabilitation," *Knights*, 219 F. 3d, at 1143, has no bearing on the legality of Detective Hancock's search pursuant to a valid probation condition. Since the search condition itself was valid, the reasons for undertaking the search are irrelevant. "We have since held that the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's actions does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." *Scott* v. *United States*, 436 U. S.

128, 138 (1978). The fact that Detective Hancock was wearing a sheriff's uniform does not allow a court to examine his motivations, or attribute motives to him. Cf. *Knights*, 219 F. 3d, at 1143. ("True, a probation officer may also wish to end wrongdoing by a probationer, but there was no 'also' about Detective Hancock's purpose").

In addition to being contrary to precedent, this approach is too difficult to apply. Even partisans of the probation/investigation distinction appreciate the difficulty in finding an improper investigatory purpose. See 4 W. LaFave, Search and Seizure § 10.10(e), pp. 794-797 (3d ed. 1996). "Moreover, the circumstances surrounding the search are not likely to point inevitably toward one purpose as opposed to the other." *Id.*, at 795. Where both police and probation officers are involved in the search, cf. *Griffin* v. *Wisconsin*, 483 U. S. 868, 871 (1987) (police tip), courts would have to untangle the different purposes of the different officers. See *ibid.* The motive issue does not stop at searches involving the police. Probation officers may also conduct searches motivated by public safety concerns. One survey indicates that most searches conducted by probation officers are motivated by public safety concerns. See Rackmill, Community Corrections and the Fourth Amendment, 57 Fed. Probation 40, 44 (Sept. 1993). Logically, every probation search will require an inquiry into the searching officer's motive if the Ninth Circuit's position is upheld.

Inquiries into the subjective intent behind discretionary actions like searches are often far ranging and difficult. Cf. *Harlow* v. *Fitzgerald*, 457 U. S. 800, 816-817 (1982) (subjective good faith standard requires a too-complex inquiry for qualified immunity cases). "[W]e believe that 'sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources.' " *United States* v. *Leon*, 468 U. S. 897, 922, n. 23 (1984) (quoting *Massachusetts* v. *Painten*, 389 U. S. 567,

565 (1968) (White, J., dissenting)). Attempts to prevent police pretext are likely to backfire.

As one authority noted in the stop and frisk context, "surely the catch is not worth the trouble of the hunt when courts set out to bag the secret motivations of policemen . . . . A subjective purpose to do something that the applicable legal rules say there is sufficient objective cause to do can be fabricated all too easily and undetectably." Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 436, 436-437 (1974) (footnotes omitted); accord, *People* v. *Woods*, 21 Cal. 4th 668, 681, 981 P. 2d 1019, 1028 (1999).

Neither the public nor the law is served well by complex, arbitrarily subjective standards. "The people in their houses, as well as the police, deserve more precision." *Kyllo* v. *United States*, 533 U. S. __ (No. 99-8508, June 11, 2001) (slip op., at 11-12). This requires a "line" that is "not only firm but also bright." *Id.* (slip op., at 12). Such a line would be formed by a rule that police officers can conduct searches pursuant to valid probation conditions, without regard to any purported motive.

III. Allowing police officers to enforce the search condition did not violate any reasonable expectation of privacy of the defendant.

Following general Fourth Amendment practice, in special needs cases this Court has "not hesitated to balance the governmental and privacy interests to assess the practicality of the warrant and probable-cause requirements in the particular context." *Skinner* v. *Railway Labor Executives' Assn.*, 489 U. S. 602, 619 (1989). That is, do the special needs justify the search? See *Griffin* v. *Wisconsin*, 483 U. S. 868, 875 (1987). In *Griffin*, this involved justifying a regulatory system that applied a search condition to every grant of probation. See *id.*, at 870-871. That inquiry took place in the context of the probationer's very limited privacy interests. See *id.*, at 874. This Court then concluded that both the warrant and probable

cause requirements would needlessly interfere with the special needs of the probation system. See *id.*, at 876, 878.

This search compares favorably to the one in *Griffin*. The greatest single difference between the two cases is that Knights consented to his probation search condition, while the search condition was imposed retroactively on Griffin. See *id.*, at 870-871, and n. 1. This substantially reduces Knights' expectation of privacy, placing his search on an even more solid constitutional footing than the one ratified in *Griffin*.

Consent is a valid exception to the Fourth Amendment's warrant and probable cause requirements. See *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 222 (1973). This Court has even upheld a consent to search that was part of an individual's contract with the federal government. See *Zap* v. *United States*, 328 U. S. 624, 628-629 (1946), vacated, 330 U. S. 800 (1947).[2] While it is not necessary to invoke *Zap* to enforce a contract between the probationer and the state, consent substantially influences the balance between privacy and society's interests.

The most recent example of consent's power over privacy is another special needs case, *Vernonia School Dist. 47J* v. *Acton*, 515 U. S. 646 (1995), where the drug testing of students who participated in athletic programs was upheld as a legitimate special needs search. See *id.*, at 664-665. The students' decreased expectation of privacy was a substantial factor in this conclusion, see *id.*, at 664, with consent playing an important role.

> "There is an additional respect in which school athletes have a reduced expectation of privacy. By choosing to 'go out for the team,' they voluntarily subject themselves to a

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2. Although the *Zap* decision was vacated on jury selection grounds, this Court has since relied on *Zap* for the point that consent is a settled exception to the probable cause and warrant requirements of the Fourth Amendment. See, *e.g.*, *Texas* v. *Brown*, 460 U. S. 730, 736 (1983); *Schneckloth*, 412 U. S., at 219; *Katz* v. *United States*, 389 U. S. 347, 358, n. 22 (1967).

> degree of regulation even higher than that imposed on students generally. . . . Somewhat like adults who choose to participate in a 'closely regulated industry,' students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy." *Id.*, at 657.

The defendant entered the probation agreement with open eyes. The search condition specifically extended its authority to police officers. See *supra*, at 2. Had he found this condition too onerous, he could refuse probation and serve his sentence. See *People* v. *Bravo*, 43 Cal. 3d 600, 608-609, 738 P. 2d 336, 341 (1987). Just like "participation in an industry that is regulated pervasively to ensure safety," see *Skinner*, 489 U. S., at 627, Knights chose to participate in probation, which requires substantial regulation of the probationer in order to protect the public, see *Griffin*, 483 U. S., at 874-875, and thus necessarily limits his privacy.

The Ninth Circuit dismissed Knights' consent, claiming that it was "limited to probation searches, and must stop short of investigative searches." *United States* v. *Knights*, 219 F. 3d 1138, 1142 (CA9 2000). This stems from the false distinction between "probation" and "investigation" searches. Since public safety is a special need in the context of probation searches, there are no different types of probation searches; a police officer may rely on a valid search condition in order to further society's interest in deterring probationers from committing crime. See part I C, *supra*. Indeed, most searches initiated by probation officers are motivated by public safety concerns. See Rackmill, Community Corrections and the Fourth Amendment, 57 Fed. Probation 40, 44 (Sept. 1993).

Another criticism of probationer consent is that the probationer has no real choice. It is argued that since prison is so much worse than any type of probation, the defendant will always accept probation no matter how onerous the conditions. See 4 W. LaFave, Search and Seizure § 10.10(b), pp. 763-766 (3d ed. 1996). The premise of this argument is doubtful. See

Petersilia, When Probation Becomes More Dreaded Than Prison, 54 Fed. Probation 23, 24 (Mar. 1990). Even assuming the premise, though, the conclusion does not follow. A difficult choice is still a choice. "Our authorities do not impose a categorical ban on every government action affecting the strategic decisions of the accused, including decisions whether or not to exercise constitutional rights." *United States* v. *Dunnigan*, 507 U. S. 87, 96 (1993). The fact that one of the two alternatives may seem particularly bad does stop it from being an alternative. As Justice Harlan explained:

> "The criminal process, like the rest of the legal system, is replete with situations requiring 'the making of difficult judgments' as to which course to follow. *McMann* v. *Richardson*, [397 U. S. 759, 769 (1970)]. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose." *McGautha* v. *California*, 402 U. S. 183, 213 (1971).

"In other contexts criminal defendants are required to make difficult choices that effectively waive their constitutional rights." *Newton* v. *Rumery*, 480 U. S. 386, 393 (1987). Thus an individual charged with a crime may obtain immunity from prosecution in exchange for abandoning a civil rights action. See *id.*, at 397-398. Plea bargaining provides another example, even though "every such circumstance has a discouraging effect on the defendant's assertion of his trial rights . . . ." *Chaffin* v. *Stynchcombe*, 412 U. S. 17, 31 (1973). A suspect also may be required to choose between submitting to a blood-alcohol test or having his refusal used against him in court. See *South Dakota* v. *Neville*, 459 U. S. 553, 554 (1983). "[B]eing forced to choose between unpleasant alternatives is not unconstitutional." *United States* v. *Kaczynski*, 239 F. 3d 1108, 1115-1116 (CA9 2001) (citing *Brady* v. *United States*, 397 U. S. 742, 750 (1970)).

When an individual is required to make a choice involving a constitutional right "[t]he threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved." See *McGautha*, 402 U. S., at 213. The answer to this question is not found in the relative harshness of the prison sentence; the defendant earned this sentence by committing a crime. What matters is the state's generosity in offering the comparatively lenient alternative of probation with a search condition.

A state does not have to offer probation instead of prison. It is an "act of grace" from the state to the probationer. See *Escoe* v. *Zerbst*, 295 U. S. 490, 492 (1935); *People* v. *Rodriguez*, 51 Cal. 3d 437, 445, 975 P. 2d 783, 788 (1990). While this does not deprive the probationer of other rights such as due process, see *Gagnon* v. *Scarpelli*, 411 U. S. 778, 782, n. 4 (1973) (distinguishing *Escoe*), probation's status as a privilege is relevant to the Fourth Amendment analysis.

The state can deprive a convicted criminal of all of his or her Fourth Amendment rights.

> "Notwithstanding our caution in approaching claims that the Fourth Amendment is inapplicable in a given context, we hold that society is not prepared to recognize as legitimate *any* subjective expectation of privacy that a prisoner might have in his prison cell and that, accordingly, the Fourth Amendment proscription against unreasonable searches *does not apply* within the confines of the prison cell." *Hudson* v. *Palmer*, 468 U. S. 517, 525-526 (1984) (emphasis added).

If this complete deprivation of Fourth Amendment rights is constitutional, then it is reasonable for a state to subject a grant of probation to a lesser, albeit broad, deprivation such as the search condition in the present case.

While it requires careful application in constitutional law, "the proposition that greater powers include lesser ones" is still valid as a matter of logic. See *44 Liquormart, Inc.* v. *Rhode Island*, 517 U. S. 484, 511 (1996) (plurality opinion). The problems with its application to constitutional law have come from improper use in First Amendment cases. In *Posadas de Puerto Rico Associates* v. *Tourism Co. of P. R.*, 478 U. S. 328 (1986), this Court held that the power to ban gambling necessarily included the lesser power to prohibit the advertising of gambling, see *id.*, at 345-346. The subsequent disapproval of *Posadas* correctly notes that regulating speech is not a lesser included power of regulating conduct. "The text of the First Amendment makes clear that the Constitution presumes that attempts to regulate speech are more dangerous than attempts to regulate conduct." *44 Liquormart*, at 512.

That has not happened in this Fourth Amendment case. Probation is not qualitatively different from incarceration the way speech is qualitatively different from conduct. "Probation is simply one point (or, more accurately one set of points) on a continuum of possible punishments ranging from solitary confinement in a maximum-security facility to a few hours of mandatory community service." *Griffin*, 483 U. S., at 875. Knights had notice of the search condition, including the authorization of searches by the police, and consented to it when he chose probation over prison. The search was supported by reasonable suspicion. The coincidence between the vandalism and Knights' problems with PG & E, the contents of Simoneau's truck, and Simoneau's close association with Knights, see *supra*, at 2, at least supported a reasonable suspicion to search Knights' apartment. As the Ninth Circuit noted, Detective Hancock "had drawn some very good inferences from the facts . . . ." *Knights*, 219 F. 3d, at 1143.[3] What happened to Knights was much less intrusive to his privacy interests than what the state could have done had it chosen to

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3. While California does not require any level of suspicion to support probation searches, see *Bravo*, 43 Cal. 3d, at 610-611, 738 P. 2d, at 342-343, it is unnecessary to decide the constitutionality of that practice in this case, since this search was amply supported by much more than reasonable suspicion.

withdraw probation as an alternative to prison. This lesser deprivation must also be deemed reasonable in light of what Knights could have faced in prison.

An individual's home is not a prison cell, but see M. Nieto, Probation for Adult and Juvenile Offenders: Options for Improved Accountability 8 (Cal. Research Bureau 1998) (house arrest for high-risk probationers), but the defendant was not an average resident. He was a convicted criminal who was serving his sentence in the community. In order to protect the community, Knights first had to consent to warrantless, suspicionless searches by any law enforcement officer before being given the relative freedom of probation. This case is not about protecting the sanctity of the home, cf. *Knights*, 219 F. 3d, at 1144-1145, but about giving the state and criminal defendants the freedom to craft alternative punishments to imprisonment.

The balance of society's interests and the defendant's privacy expectations favors the search. The threat to public safety posed by probationers creates a special interest in deterring probationer's criminal tendencies through the prospect of warrantless searches by police officers without regard to the searching officer's motive. See part I, *supra*. As demonstrated above, defendant's expectation of privacy "that society recognizes as 'legitimate,' " *Vernonia*, 515 U. S., at 654, is small.

Upholding this search would encourage creative alternatives to prison. Both society and those probationers who genuinely wish to reform would benefit by holding Knights to his end of the bargain.

CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit should be reversed.

July, 2001

Respectfully submitted,

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COPY

No. 00-1260

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, *Petitioner,*

v.

MARK JAMES KNIGHTS, *Respondent.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE STATE OF CALIFORNIA IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether respondent's agreement to a term of probation that authorized any law enforcement officer to search his person or premises with or without a warrant, and with or without individualized suspicion of wrongdoing, constituted a valid consent to search by a law enforcement officer investigating crimes.

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IN THE SUPREME COURT OF THE UNITED STATES

No. 00-1260

UNITED STATES OF AMERICA, *Petitioner,*

v.

MARK JAMES KNIGHTS, *Respondent.*

INTEREST OF AMICUS CURIAE

Pursuant to a probation search condition, California law enforcement officers searched respondent Knights's home without a warrant. Knights now challenges the constitutional validity of the condition. Knights agreed to the condition after being convicted of a misdemeanor drug offense. He signed a probation order (which a judge countersigned) acknowledging that he had read, understood and agreed to abide by specified terms and conditions of probation. They included conditions that he obey all laws, submit to drug or alcohol testing as directed by a probation officer or any peace officer, and "[s]ubmit his . . . person, property, place of residence, vehicle, [and] personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause, by any probation officer or law enforcement officer." *People v. Knights*, Napa County Municipal Court No. CR 33859, Order dated May 29, 1998; C.A.E.R. 73.

California writes to explain that law enforcement searches with or without a warrant or reasonable suspicion of new offenses can be based on consensual probation conditions consistent with this State's legislative policy. Searches under such consensual conditions are necessary to any realistic chance of success on probation for numerous

offenders in this State. They are conducted not only to enforce the criminal law, but also to deter the probationer from backsliding into criminal habits and assist in ensuring compliance with associated conditions of probation, such as drug testing by probation officers or peace officers, a condition to which Knights also agreed. For some offenders whose offenses carry a heavy risk of recidivism, such search conditions are deemed by California law to be indispensable to conditional release. Because this State's legislative policy precludes probation except upon the consent of the offender to probation on such conditions as will both secure the public safety and address the rehabilitation of the individual, an individual assessment by the sentencing court is required of the appropriateness of search conditions in relation to the offense and the prospects for the offender's rehabilitation. The offender retains the choice of either accepting the conditions of probation or undergoing the sentence, and the sentencing court's assessment is subject to review on appeal.

Knights chose probation and now wants the Fourth Amendment to relieve him of the consequences of his choice. After the fact, he seeks to qualify his consent with a proviso that searching law enforcement officers must enforce probation, not investigate crimes. Similarly, the opinion below views detectives to be engaged in a subterfuge by obtaining evidence of a crime using a probation search condition without the purpose to rehabilitate the probationer. However, searches based upon consent to warrantless searches with or without reasonable cause by "any probation officer or law enforcement officer" are not lacking a probationary purpose. Just as the susceptibility of the probationer to *potential* warrantless, suspicionless searches encourages obedience to the conditions of probation by deterring criminal activity, *actual* searches to investigate crime are undergirded with a probationary purpose because a new crime is a violation of probation. California has a strong interest in defending its probationary system, including its reliance upon consensual probation conditions to investigate criminal conduct by its probationers, conduct that would invariably be a violation of the terms of probation and that would potentially demonstrate that the reformatory purpose of probation was no longer viable.

SUMMARY OF ARGUMENT

Permitting probationers to repudiate their consent to searches by law enforcement seeking evidence of new crimes would significantly impair California's ability to monitor its probationers. At a minimum, if the probationer is under supervision, police likely would have to first request the probation officer to decide whether a search for evidence of a probation violation was warranted, which is at odds with consent to searches *without* reasonable cause by probation officers *or* law enforcement officers. Even if such authorization were obtained, however, evidence of a new crime might still be subject to suppression if a court later decided the probation officer was merely a "stalking horse" for law enforcement. Additionally, in the case of a summary probationer like respondent Knights, prior judicial authorization would probably be required to invoke consensual search conditions to investigate new crimes because a probation officer who did not supervise the probationer could be deemed an interloper and the evidence likewise suppressed.

Such qualifications and special exceptions to enforcing search conditions run counter to any rational operation of this State's probation system. Consent-based conditions for law enforcement searches of probationers reflect important reformatory objectives in California. Not the least of those objectives is to enhance the level of the State's supervision of a widely dispersed and diverse population of probationers. Local law enforcement officers often have more familiarity with a probationer's behavior, associations and ongoing criminal predilections than the probation staff. Additionally, personal acknowledgment by the offender in accepting probation of the responsibility to submit to searches by law enforcement officers encourages conforming habits and behavior that do not invite suspicion of probation violations such as new crimes during the term of probation. Such probation search conditions also may assist in reducing confrontation when searches occur. And it reinforces to the probationer that pliancy is not merely desired, but enforceable since resistance to a law enforcement search may violate the probation condition.

For these and other reasons, searches for investigative purposes by law enforcement officers pursuant to consent are essential

for effective probationary supervision in particular cases and reflect a reasonable policy of allocating finite probation resources among offenders in this State. The California Supreme Court admits evidence procured in reliance upon similar probation orders as the product of valid consent under the Fourth Amendment because such searches meet the goals of the State's probation system. *See People v. Bravo*, 738 P.2d 336, 342 (Cal. 1987). Nothing in the Fourth Amendment decisions of this Court dictate a different choice by California.

ARGUMENT

CALIFORNIA ALLOWS PROBATIONERS TO CONSENT TO SEARCHES WITH OR WITHOUT A WARRANT OR REASONABLE SUSPICION EITHER BY PROBATION OFFICERS OR LAW ENFORCEMENT OFFICERS FOR LEGITIMATE REFORMATORY OBJECTIVES

A search conducted pursuant to a valid consent is an exception to the requirements of both a warrant and probable cause under the Fourth Amendment. *Schneckloth v. Bustamonte* 412 U.S. 218, 219 (1973).

Three decades ago in *People v. Mason*, 488 P.2d 630 (Cal. 1971), the California Supreme Court approved searches conducted under the authority of a condition of probation by law enforcement officers seeking evidence of a crime. It did so, recognizing the dual purpose in this State of such provisions to deter further offenses by the probationer and to ascertain whether he or she is complying with the terms of probation. *Id.* at 632. The state supreme court held that probation searches are a product of consent and valid under *Zap v. United States*, 328 U.S. 624 (1946), *vacated,* 330 U.S. 800 (1947)(per curiam).[1/] *See Mason*, 488 P.2d at 633. In *Zap*, this Court rejected a challenge by a government contractor convicted of presenting false claims to a search conducted pursuant to a contract provision allowing inspection of the accounts, saying that "when petitioner, in order to obtain the government's business, specifically agreed to permit inspection of his accounts and records, he voluntarily waived such claim to privacy which he otherwise might have had as respects business documents related to

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1. Although the judgment in *Zap* was vacated, this Court has continued to cite the decision in its Fourth Amendment jurisprudence in cases such as *Bustamonte*, 412 U.S. at 219.

those contracts." 328 U.S. at 628. Similarly, the California Supreme Court held, "when [a] defendant in order to obtain probation specifically agree[s] to permit at any time a warrantless search of his person, car and house, he voluntarily waive[s] whatever claim of privacy he might otherwise have had."[2/] 488 P.2d at 634.

Nor must a searching officer have reasonable suspicion of a new crime if the offender accepts probation conditioned upon a waiver of Fourth Amendment rights. *People v. Bravo*, 738 P.2d 336 (Cal. 1987). In *Bravo*, the probation condition required the probationer to "[submit his person and property to search and seizure at any time of the day or night by any law enforcement officer with or without a warrant." *Id.* at 337 n1. The California Supreme Court noted that under state law, "'[i]f the defendant considers the conditions of probation more harsh than the sentence the court would otherwise impose, he has the right to refuse probation and undergo the sentence.'" *Id.* at 341. Citing *Bordenkircher v. Hayes*, 434 U.S. 357, 360-64 (1978), the court observed that "[a] probationer's waiver of his Fourth Amendment rights is no less voluntary than the waiver of rights by a defendant who pleads guilty to gain the benefit of a plea bargain." *Bravo*, 738 P.2d at 341. Unless a sentencing judge in the exercise of discretion places a requirement of "reasonable cause" in the probation search condition either initially or as a modification of the terms of probation, *id.* at 340 n.6, a probationer in California accepting a condition authorizing warrantless searches is "subject to search at any time for a proper probation or law enforcement purpose," consistent with the scope of the consent to warrantless searches. *Id.* at 341. A "search or seizure pursuant to a valid consent

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2. Other states uphold conditions of release authorizing searches by law enforcement officers. *See, e.g., State v. Montgomery*, 566 P.2d 1329, 1330-31 (Ariz. 1977); *State v. Perbix*, 331 N.W.2d 14, 21-22 (N.D. 1983); *Anderson v. Commonwealth*, 490 S.E.2d 274, 276-77 (Va. Ct. App. 1997), *aff'd on re'hg en banc*, 495 S.E.2d 547 (Va. Ct. App.), *aff'd*, 507 S.E.2d 339 (Va. 1998); *see also* Jay M. Zitter, Annotation, *Validity of Requirement That, As Condition of Probation, Defendant Submit to Warrantless Searches*, 2000 A.L.R. 3 (tentative draft), *available at* 2000 WL 798014.

does not violate the Fourth Amendment, [and] . . . is not unreasonable unless it exceeds the scope of the consent." *Id.* at 342. The probation condition in *Bravo* expressly waived "'whatever claim of privacy [the probationer] might have otherwise had.'" *Id.*, *quoting Mason*, 488 P.2d at 634. The court in *Bravo* noted, "Were we to conclude that a probationer's waiver of Fourth Amendment rights were either impermissible or limited to searches conducted only upon a reasonable-suspicion standard, the opportunity to choose probation might well be denied to many felons by judges whose willingness to offer the defendant probation in lieu of prison is predicated upon knowledge that the defendant will be subject to search at any time for a proper probation or law enforcement purpose. We see no basis for denying a defendant the right to waive his Fourth Amendment rights in order to accept the benefits of probation." *Bravo*, 738 P.2d at 341. Because the purpose of unprovoked searches is to both deter the probationer from committing new offenses and to assess his continued amenability to rehabilitation by determining whether he is obeying the law, according to the state court, conditioning warrantless searches upon reasonable cause would render the probation order superfluous. *Id.* at 342.

Accordingly, not all probationers in California have search conditions, and those who do have such conditions consented to them at the time of sentencing.[3/] *People v. Woods*, 981 P.2d 1019, 1025 n.5 (Cal. 1999). Offenders do not have to refuse probation to seek judicial review of a search condition, but must object at the time of the sentencing hearing to obtain such review. *Id.* In California, search conditions are not imposed on probationers based on special needs of a regulatory system beyond the need for law enforcement as in *Griffin v. Wisconsin*, 483 U.S. 868, 873-75 (1987), but are the product of a judicial assessment

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3. By contrast, parolees, who may not refuse release, are by law subject to searches without warrant or cause at any time of the day or night by parole or peace officers. *See* Cal. Penal Code § 3067; Cal. Code Regs., tit. 15, § 2511(b). Such searches are justified by the parolees reduced expectation of privacy and the special needs attendant to monitoring of the parolee's transition into society. *See People v. Reyes*, 968 P.2d 445, 450-51 (Cal. 1998).

that enforcement searches are appropriate under the governing considerations for release defined by state law if the particular offender accepts probation.[4]

It is clear that "whether the purpose of the search is to monitor the probationer or to serve some other law enforcement purpose, or both, the search in any case remains limited in scope to the terms articulated in the search clause[.]" *Woods*, 981 P.2d at 1027-28. The contrary argument is reminiscent of *Zap*, 328 U.S. at 628, where the Court was presented with a "suggestion that the search was unreasonable because made by agents of the Federal Bureau of Investigation who were not persons authorized to conduct those [contract audit] examinations." While finding the agents had acted under the auspices of Navy Department representatives authorized to inspect, the Court also stated that "the right to inspect granted by the contracts was not limited to inspections by the Navy but extended to inspections by any authorized representatives of the government among whom the agents of the Federal Bureau of Investigation are included." *Id.* at 628-29. On this basis, the agents were "lawfully on the premises." *Id.* at 629. Similarly, there is no reason to find the search consent in this case did not encompass searches by sheriff's detectives acting as law enforcement officers.

The suggestion is made that "[n]o state, by statute, expressly permits a warrantless search by peace officers" and that California in particular has not clearly authorized such warrantless searches in its probation statutes. Br. of Amicus Curiae Rutherford Institute at 6, 11-12. Both assertions distort California law. California statutes provide broad discretion to determine whether probation is appropriate and what conditions should be imposed. *People v. Welch*, 851 P.2d 802, 805 (Cal. 1993). *See* Cal. Penal Code §§ 1203(b)(3), 1203a. Most conditions stem

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4. As one commentator has observed, *Griffin* was a "special needs" case involving a regulatory system which imposed probation searches on "*all* probationers, *without their consent*, and *regardless of the crime they committed.*" Sean M. Kneafsey, Comment, *The Fourth Amendment Rights of Probationers: What Remains After Waiving Their Right to Be Free From Unreasonable Searches and Seizures?*, 35 Santa Clara L. Rev. 1237, 1257 (1995).

from a statutory grant of discretion to the court to impose such "reasonable conditions, as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and generally and specifically for the reformation and rehabilitation of the probationer." *Welch*, 851 P.2d at 805-06; *see* Cal. Penal Code § 1203.1(j). *Mason*, 488 P.2d 630, held that a condition of probation for warrantless searches by police officers was valid under § 1203.1 as "reasonably related to the probationer's prior criminal conduct and . . . aimed at deterring or discovering subsequent criminal offenses." *Id.* at 632. The court in *Mason* found it "beyond dispute" that such a warrantless search condition in narcotics cases was authorized under the statute, being related to the probationer's reformation and rehabilitation in the light of the offense of which he was convicted. *Id.* & n.2. California Penal Code section 1203.1 has been amended several times in the last three decades without alteration to *Mason*'s holding. Additionally, with respect to selected offenses carrying an acute risk of recidivism involving child molestation, abuse or neglect, a special release program in this State entitled deferred entry of judgment has been enacted that expressly requires the offender's submission to search or seizure by any probation officer or law enforcement officer. Cal. Penal Code § 1000.12(c)(1) & (c)(4)(D). Finally, under California's Proposition 36, effective July 1, 2001, adults convicted of misdemeanor or felony "non-violent drug possession offenses," may not be sentenced to jail or prison, and subject to certain exceptions must instead be granted probation. The law prohibits incarceration, requires completion of a drug treatment program and provides that "the trial court is not otherwise limited in the type of probation conditions it may impose." Cal. Penal Code § 1210.1(a), added by Prop. 36, § 5 [The Substance Abuse and Crime Prevention Act of 2000], adopt. at the Gen. Elec., November 2000. Thus, California's electorate has authorized warrantless searches by law enforcement officers as permitted under prior state law whenever adult drug offenders are admitted to Proposition 36 probation.

By the end of 1998, the year this case arose, California's adult probation caseload in felony and misdemeanor cases stood at 324,427. Criminal Justice Statistics Center, Cal. Dept. of Justice, *California Criminal Justice Profile*, Tables 7 & 23 (1998), *available at*

http://caag.state.ca.us/cjsc/prof98/toc/toc59.pdf. A measure of the significant resources consumed supervising probationers in this State appears in the fact that California courts revoked probation in 43,650 felony cases and in 18,858 misdemeanor cases in that single year. *Id.* Tables 25 & 26. The State had only 7,368 probation officers compared to 67,035 sworn law enforcement officers. *Id.* at Table 9.

The resources available for probation services are not unlimited. It is evident that in California, the impossibility of utilizing search conditions to investigate the probationer's involvement in further violations of the law would mean that in numerous cases the court could not fashion probationary terms that serve the needs of the particular offender and assure an adequate level of supervision. It is unlikely that prohibiting probation searches for investigative purposes by the police would result in increased privacy for California's probationers. Instead, there would be a reallocation of probation services away from rehabilitative programs, vocational counseling, drug testing and education toward investigative searches of probationers. Offenders who would otherwise enjoy the liberty of probation would suffer from an increased judicial preference for jail and prison terms to maintain adequate control over them. Such a result is not only contrary to the clear policy preferences of Californians generally but is unnecessary in light of the long-standing jurisprudence of this Court approving consensual searches and of the California Supreme Court, which has for decades relied on the consent principle to validate investigative searches in order to further the reformatory and supervisory objectives of the State's probation system.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Dated: July 11, 2001

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(10)

Supreme Court, U.S.
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No.00-1260

In The

Supreme Court of the United States

THE UNITED STATES OF AMERICA,

Petitioner,

v.

MARK JAMES KNIGHTS,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals For The Ninth Circuit

BRIEF AMICI CURIAE OF THE CALIFORNIA PUBLIC DEFENDERS ASSOCIATION AND THE PUBLIC DEFENDER OF VENTURA COUNTY, CALIFORNIA, IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

If police conduct a search for ordinary law enforcement purposes and one of the persons searched is on probation and has been ordered by the sentencing court to "submit" to government searches, does the exclusionary rule still apply in any new criminal prosecution?

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In The
SUPREME COURT OF THE UNITED STATES

United States of America,

Petitioner,

v.

Mark James Knights,

Respondent.

BRIEF AMICI CURIAE OF THE CALIFORNIA PUBLIC DEFENDERS ASSOCIATION AND THE PUBLIC DEFENDER OF VENTURA COUNTY, CALIFORNIA

INTEREST OF AMICI CURIAE

The California Public Defenders Association (CPDA) is one of the largest associations of criminal defense lawyers in the nation. CPDA presents over twenty educational programs each year on topics related to criminal justice. CPDA has an active amicus committee and frequently participates as amicus in criminal justice cases. (See, e.g., *California v. Trombetta*, 467 U.S. 479 (1984); *Monge v. California*, 524 U.S. 721 (1998); *Stone v. Powell*, 428 U.S. 465 (1976).)

The Public Defender of Ventura County is an active participant in CPDA. Two of the attorneys in the office have served as President of CPDA; Public Defender Kenneth I. Clayman and Chief Deputy, Michael C. McMahon. The office of

the Public Defender of Ventura County has some fifty defense lawyers involved in every aspect of criminal defense practice. Public Defender Clayman is aware of the history of California probation law and the pragmatic demands of the probationary supervision.[1]

The California Public Defenders Association and the Public Defender of Ventura County are in the front lines of a daily battle over the future of the Fourth Amendment in this state. The vast majority of persons arrested following a probation search end up represented by a California public defender.

SUMMARY OF FACTS AND CASE

Amici conclude the summary of facts of the case set forth by respondent in his brief are complete, accurate, and non-misleading. Some facts are worthy of repeating. A California judge sentenced Knights to unsupervised probation for a misdemeanor conviction. As a condition of that probation, the judge ordered Knights to "submit" to governmental searches. Knights acknowledged the order and agreed to abide. He signed a copy and complied with the order to submit. Later, in a new criminal prosecution, Knights moved to suppress evidence seized in a search on the grounds it was a warrantless search conducted for ordinary law enforcement purposes. The Ninth Circuit and the District Court agreed that the

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1 This brief was written entirely by counsel for amici without assistance or contributions from any party. Both parties gave written consent to the filing of this brief.

misdemeanor probation order did not render the exclusionary rule inapplicable to the new prosecution. Knights fully submitted to the search as he was ordered to do by the state court. Amici see nothing in the record suggesting Knights' motion to suppress evidence in a new criminal prosecution in federal court constitutes a violation of the earlier state court order to submit to the search itself.

THE MAGNITUDE OF THE PROBLEM - CALIFORNIA'S FOURTH AMENDMENT CRISIS

California is the most populous state in the country with many people on actively supervised probation. California courts have placed countless more persons on unsupervised probations or "conditional sentences." Many of these unsupervised probations have some form of probation search condition.

California has no standard probation search condition. Each judicial officer enjoys broad discretion to draft conditions of probation unique to the individual case. Some conditions authorize limited searches for computers, stolen vehicles, narcotics, or deadly weapons. Others, as in this case, merely order the probationer to submit whenever a law enforcement officer wishes to search him. (See, e.g., *People v. Kurey*, 88 Cal.App.4th 840 (Mar. 28, 2001).)

Many California law enforcement agencies have databases listing persons on probation or with a probation search condition. Many databases are not designed to alert officers to the limitations of the specific condition. (See, *People v. Spence*, 78 Cal.App.4th 1242 (2000), rev. grntd. and pending in S087865.)

California's implementation of "probation searches" has undermined the Fourth Amendment rights of all. These searches take place in homes shared with non-probationers, hotels, offices, and on the streets. Most traffic stops are now prolonged by an interrogation of all passengers about their probationary status. Unfruitful interrogations are further prolonged by routine solicitations of consent to search. (See, e.g., *People v. Russell*, 81 Cal.App.4th 96, 105 (2000) "The officer at one point asserted a privilege when asked about African-Americans, then said two men traveling alone may constitute a possible drug indicator regardless of race, but Hispanics were considered to be in primary control of the drug market.") Racial profiling does further damage. The California Legislature passed a bill aimed at eliminating racial profiling by a two-thirds majority. It was vetoed by California Governor Gray Davis.

Disagreement over abuses of such search conditions have bitterly divided the California Supreme Court. ("For my part, I would leave the Fourth Amendment alone, and simply declare what I believe to be implied under state law, namely, that a probationer's consent to searches and seizures is limited to such as may be conducted for the purpose of ensuring his compliance with his probation and its terms.") (*People v. Robles*, 23 Cal.4th 789, 802 (2000) Mosk, J., conc. opn.; "...the Fourth Amendment does not permit "police to use a probation search condition, which authorizes the warrantless, suspicionless search of a probationer, as authority to search a home for the express purpose of seeking evidence against nonprobationers who share the residence with the probationer." (*Id*, at

p.803, Kennard, J., conc.).) California courts have concluded that an officer's improper subjective motivations, which are irrelevant when the officer is armed with probable cause, are also irrelevant when the subject's probation has some search condition. As they see it, this conclusion is compelled by this Court's holding in *Whren v. United States*, 517 U.S. 805 (1996); "By succumbing to the trap of the facile formula that beguilingly substitutes for critical analysis, the court in *Tyrell J.* reached a constitutionally suspect conclusion. For that reason, we should avoid endorsing, and thus perpetuating, its dubious reasoning." (*Id.*, at p. 806, Brown, J. , opn.)

SUMMARY OF THE ARGUMENT

Being released on parole is different than being a prison inmate. Being sentenced to probation is different than being released on parole after a prison sentence. The reasonable expectations of privacy of inmates, parolees, and probationers are different.

Probation is the primary method of sentencing offenders. Court-supervised probations are common for less-serious offenses. Courts are well-equipped to apply a special needs analysis to the monitoring of persons released on court-supervised probation. Suspicionless or warrantless searches for ordinary law enforcement purposes violate the Fourth Amendment. A theory that probationers "consent" to unreasonable conduct beyond that necessary under the special needs doctrine is both unworkable and undesirable. Police conduct suspicionless searches in hopes that one of the persons

searched may be on probation with some form of search condition. Many non-probationers suffer.

The state court order to submit to all future searches does not preclude Knights', post-search, federal court challenge to the constitutionality of this search.

ARGUMENT

I.
THE "CONSENT" THEORY IS UNHELPFUL. THE MAJORITY OF CALIFORNIA PROBATIONERS ARE ON PROBATION BECAUSE PROBATION IS THE APPROPRIATE SENTENCE UNDER CALIFORNIA LAW.

Some suggest that California probationers voluntarily consent to onerous conditions of probation to avoid prison. But, the majority of California probationers are granted probation because it is the appropriate sentence under California law. California has neither the inclination nor the resources to imprison needlessly. Both the offender and the state benefit from the grant of probation in appropriate cases. Victims of crime receive restitution from working probationers.[2]

The California Penal Code and Rules of Court virtually mandate probation for eligible and deserving offenders. (See, California Rules of Court, Rule 4.414, and California Penal Code, §

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2 In November of 2000, California voters enacted Proposition 36. The new state law mandates probation and treatment for most drug offenses. Ballot materials suggest the change will benefit the public at large.

1203(a).) If the facts relating to the nature, seriousness, and circumstances of the crime and the defendant warrant a grant of probation, a prison sentence is an abuse of sentencing discretion. (*People v. Bloom*, 142 Cal.App.3d 310, 322 (1983) [error to deny probation based solely upon a fact inherent to the commission of all cases involving that offense, such as the "vulnerability" of victims of drunk drivers] cf., *Charles S. v. Superior Court*, 32 Cal.3d 741 (1982) [abuse of discretion to deny informal probation to juvenile because of his inability to pay restitution.].)

The contention that probationers voluntarily consent to unreasonable conditions of probation to avoid an inappropriate prison sentence is a fiction. The court may impose reasonable terms of probation without the consent of the defendant. If the defendant makes a specific and timely objection to the condition, the condition may be challenged on appeal. Appeal is not barred on a theory of invited error, waiver, or consent. (*People v. Welch*, 5 Cal.4th 228 (1993).)

In extreme and isolated cases, if a defendant believes that probation with an unreasonable condition is harsher than imprisonment, he may demand imprisonment if he does so promptly. (See, *In re Osslo*, 51 Cal.2d 371 (1958).)

Generally, the California appellate courts will strike inappropriate conditions of probation, despite the fact the defendant "consented" to probation. (*People v. Williams*, 144 Cal.App.2d 144 (1956) [prolonged suspension of driver's license]; *People v. Hackler*, 13 Cal.App.4th

1049, 1060 (1993)[requiring probationer to wear a shirt branding him as a probationer].)

This court should invalidate probation search conditions crafted to facilitate ordinary law enforcement. Such conditions are over broad and unreasonable under the Fourth Amendment.

II.

A SEARCH BASED UPON A CONDITION OF PROBATION SHOULD BE ANALYZED UNDER THE "SPECIAL NEEDS" DOCTRINE, RATHER THAN A FICTIVE "CONSENT" OR "WAIVER" THEORY. THE SPECIAL NEEDS DOCTRINE REQUIRES REASONABLE GOVERNMENT ACTION. FOR POLICY PURPOSES, A PROBATIONER SHOULD NOT BE ALLOWED TO CONSENT TO UNREASONABLE GOVERNMENT ACTION OR WAIVE THE REQUIREMENT THAT THE GOVERNMENT ACTION BE REASONABLE.

In limited circumstances, a search unsupported by either warrant or probable cause can be constitutional when "special needs" other than the normal need for law enforcement provide sufficient justification. (*Ferguson v. City of Charleston*,____ __ ___ U.S. ___, 121 S.Ct. 1281, 1286, n. (2001); see also *Vernonia School District 47J v. Acton*, 515 U.S. 646, 652-53 (1995); *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987).)

The special needs doctrine "is an exception to the general rule that a search must be based on individualized suspicion of wrongdoing." (*City of Indianapolis v. Edmond*, 531 U.S. 32, 54 (2000) (Rehnquist, J., diss. opn.).)

Although a search of a probationer may be justified by the special needs doctrine, the search of Knights' apartment by the Napa County Sheriff Detective is not so justified. The district court's finding of fact that the search was conducted for the purpose of ordinary law enforcement is supported by record.

Petitioner is forced to rely on a consent theory. The Fourth Amendment test for a valid consent to search is that the consent be voluntary, and "[v]oluntariness is a question of fact to be determined from all the circumstances," (*Schneckloth v. Bustamonte*, 412 U.S. 218, 248-49 (1973).)

Yet the petition for certiorari complains of "substantial disruption of law enforcement efforts in California" because of confusion regarding searches based upon a search condition in a probation order.

Use of the "special needs" doctrine would allow this court to articulate guidelines of reasonableness that would do much to minimize confusion and resulting disruption. Use of a fictive "consent" or "waiver" theory, on the other hand, will maximize both confusion and disruption because California has no regulatory scheme governing probation searches and no standard term of probation specifying the scope of searches authorized. Consequently, each sentencing judge is free to create his own, case-specific search condition in each grant of probation.

Therefore, the "totality of circumstances" in each case will present a unique result regarding the scope and voluntariness of any alleged "consent" or "waiver." By using a "consent" analysis of probation searches, rather than a

"special needs" analysis, California courts have created the very confusion and disruption decried in the petition for certiorari. A special needs approach will reduce the number of violations of Fourth Amendment rights of both probationers and those in propinquity to them.

A probation search term should be rationally related to the probation itself. Federal courts have reached the same conclusion. In *U.S. v. Stoural*, 990 F.2d 372 (8th Cir.1993), for example, Stoural was convicted pursuant to his guilty plea of conversion of collateral pledged to Farmers Home Administration and sentenced to five years probation and full restitution. Stoural appealed and the Court of Appeals held that conditions of probation prohibiting defendant from purchase, possession, and use of any alcohol and subjecting him to warrantless searches for alcohol and drugs at any time were not reasonably related to crime to which he plead guilty and would be vacated.

Although the Eighth Circuit relies on federal statutes, the statutes, like California case law, require that probation conditions be reasonably related to the nature and circumstances of the offense, the history and characteristics of the defendant, and the purposes of sentencing. (Accord, *United States v. Prendergast*, 979 F.2d 1289, 1293 (8th Cir.1992).)

Under a "consent" or "waiver" analysis, *Stoural* and *Prendergast* could be lawfully searched under these unlawful conditions of probation under a theory they waived the protections of the Fourth Amendment and the federal statutes and consented in advance to the search. A special needs analysis, on the other hand, exposes the unlawful scope of the condition.

The use of consent analysis by the California courts has been criticized. ("From its consent rationale to its reliance on *Whren v. United States* (1996) 517 U.S. 806, the majority opinion is fatally flawed at every turn: on the law, on the facts, on principle.* * *. By their decision today, a majority of this court set the history of personal liberties back more than 200 years and resurrect a specter of the general warrants and writs of assistance so abhorred in England and the American Colonies the very impetus of the Fourth Amendment.") (*People v. Woods*, 21 Cal.4th 668, 683 (1999), Brown, J. diss. opn.) Justice Brown's dissenting opinion in *Woods* also notes that a police officer who does not conduct a search for a valid probationary purpose is not engaged in otherwise lawful conduct, thereby vitiating the consent justification.

Even the confused California courts have realized that advance consent to unreasonable police conduct may be contrary to the public interest (*People v. Freund*, 48 Cal.App.3d 49 (1975) [probationers' consent to waive the right to "knock and notice" procedures condones violations of law by law enforcement officers and is not reasonably related to the authority of the court to grant probation.].)

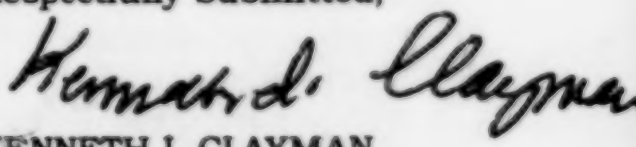
The "required advance consent" theory is a tool, poorly designed for a complicated job. The guidance of this Court is necessary to restore common-sense and reasonableness to an important social problem.

CONCLUSION

A California judge sentenced Knights to unsupervised probation for a misdemeanor conviction. As a condition of that probation, the judge ordered Knights to "submit" to governmental searches. Knights acknowledged the order and agreed to abide. He signed and complied with the order to submit. Later, in a new criminal prosecution, Knights moved to suppress evidence seized in a search on the grounds it was a warrantless search conducted for ordinary law enforcement purposes. The Ninth Circuit and the District Court agreed that the misdemeanor probation order did not render the exclusionary rule inapplicable to the new prosecution. That conclusion was correct and the decision should be affirmed.

August 22, 2001

Respectfully Submitted,



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NO. 00-1260

IN THE
SUPREME COURT OF THE UNITED STATES

UNITED STATES,
Petitioner,

v.

MARK JAMES KNIGHTS,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE RUTHERFORD INSTITUTE IN SUPPORT OF RESPONDENT

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

STATEMENT OF *AMICUS CURIAE* INTEREST AND INTRODUCTION[1]

The Rutherford Institute is an international, non-profit civil liberties organization headquartered in Charlottesville, Virginia. The Institute, founded in 1982 by its President, John W. Whitehead, educates and litigates on behalf of constitutional and civil liberties. Attorneys affiliated with the Institute have filed petitions for writ of certiorari in the United States Supreme Court in more than two dozen cases, and certiorari has been accepted in several significant constitutional cases. *See Frazee v. Dept. of Employment Sec.*, 489 U.S. 829 (1989); *Arkansas Educational Television Comm'n. v. Forbes*, 523 U.S. 666 (1998); and *Good News Club v. Milford Central School*, 121 S.Ct. 2093 (2001). Institute attorneys have filed numerous *amicus curiae* briefs in the United States Supreme Court in cases involving the rights of the accused.[2] Institute attorneys currently handle several hundred cases nationally,

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[1] The Solicitor-General of the United States and counsel for Respondent have consented to the filing of this brief. Copies of the letters of consent are on file with the Clerk of the Court. Counsel for The Rutherford Institute authored this brief in its entirety. No person or entity, other than the Institute, its supporters, or its counsel, made a monetary contribution to the preparation or submission of this brief.

[2] *See, e.g., Wyoming v. Houghton*, 526 U.S. 295 (1999), *Slack v. McDaniel*, 529 U.S. 472 (2000), *Illinois v. Wardlow*, 528 U.S. 119 (2000); *Florida v. J.L.*, 529 U.S. 266 (2000); *Indianapolis v. Edmond*, 531 U.S. 32 (2000); *Ferguson v. City of Charleston*, 121 S.Ct. 1281 (2001), and *Illinois v. McArthur*, 531 U.S. 326 (2001).

including numerous Fourth Amendment cases. The Institute has published educational materials and taught continuing legal education classes in this area as well.

The issue presented by this Petition, the degree to which a probationer can be searched "any time of the day or night by any peace officer," is a question of great concern, insofar as it touches upon how society deals with offenders and assures itself that the offender does in fact comply with conditions of probation while on a discretionary grant of probation. Counsel for *amicus* and The Rutherford Institute have conducted extensive research on state statutory authority for probation searches. Because of the breadth of its knowledge on this subject, the Rutherford Institute believes that its insights on this issue will be helpful to understand more accurately the legal environment in California with respect to that issue. Sup. Ct. Rule 15.2.

SUMMARY OF ARGUMENT

This Court has consistently held that for a search to be valid, it must either comply with the Fourth Amendment or be legislatively, and expressly, authorized. Of the several states, District of Columbia and the territories of the United States, only three states, including California, permit search of a probationer any time of the day or night by any peace officer. Of a large number of state supreme courts that have considered the issue, all but three have rejected such a scheme as unconstitutional. The Ninth Circuit Court of Appeals' decision is therefore consistent with stare decisis from this Court and an overwhelming majority of state supreme courts. As California has not legislatively authorized search and seizure any time of the day or night by clear and unequivocal language for those on probation, the court should affirm the decision of the Ninth Circuit based on stare decisis.

ARGUMENT

I.

THE NINTH CIRCUIT'S DECISION IS IN ACCORD WITH STARE DECISIS OF THIS COURT AND A MAJORITY OF THE STATE COURTS THAT HAVE CONSIDERED THE ISSUE

A. There Must Be A Clear, Express, Statutory Authorization For A Fourth Amendment Waiver To Be Effective

While statutory authorization of warrantless searches is not the *sine qua non* of a valid search, in the absence of an express statutory authorization, traditional Fourth Amendment rules must apply. *Colonnade Corp. v. United States*, 397 U.S. 72 (1970). In *Colonnade*, a case arising under 26 USC §§ 5301(c), 5146, and 7606 for possible violations of the Internal Revenue Code, the agents sought evidence of violations and demanded entry to inspect pursuant to a statutory authorization, which provided for sanctions on refusal to permit entry but did not expressly provide for a warrantless entry to search. The Court noted "Congress has broad power to design such powers of inspection under the liquor laws as it deems necessary to meet the evils at hand." *Colonnade*, 397 U.S. at 76. It went on, however, to note "that administrative entry, without consent, upon the portions of the commercial premises not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure...." *Id.* at 76-77. The Court concluded, "Where Congress has authorized inspection but made no rules governing the procedure that inspectors must follow, the Fourth Amendment and its various

restrictive rules apply." *Id.* at 77; *cf. United States v. Biswell*, 482 U.S. 691 (1972) (express Congressional authorization; regulated industry). In *Payton v. New York*, 445 U.S. 573 (1980), the Court struck down a state statute that permitted warrantless searches absent probable cause. *See also G.M. Leasing Corp. v. United States*, 429 U.S. 338 (1977) (warrantless entry and seizure of assets on company property unlawful); *See v. Seattle*, 387 U.S. 541 (1967) (warrantless administrative inspection in commercial building unlawful); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920); and *cf. Illinois v. Krull*, 480 U.S. 340, 349-355 (1986) (statutory scheme for inspection of junk dealers held unconstitutional under state law) with *New York v. Burger* 482 U.S. 691, 699-703 (1987) (statutory inspection scheme of junk dealers upheld). Consequently, where no express legislative authorization exists that is reasonably related to the purposes of a probation program, traditional Fourth Amendment procedures must apply to avoid delegating unfettered discretion to peace officers.

All States make some provision for probation. Not all States are consistent with what conditions should be required, and some have not made any statutory provisions at all for conditions.[3]

[3] That there should be legislation, and uniformity in the legislation, is obvious in light of the states' various enactments of the Uniform Act for Out-Of-State Parolee Supervision. See United States Code and state statutory provisions cited in Appendix A. The Act does not provide for any particular conditions of probation, except as follows: "(2) That each receiving state will assume duties of visitation and of supervision over probationers or parolees of any sending state and in the exercise of those duties will be governed by the same standards that prevail for its own probationers and parolees." Cal. Pen. Code. § 11177. This provides for discriminatory treatment. For example, a probationer from Illinois on supervision in California is subject to searches "any time of the day or night by any probation officer or peace officer" whereas a probationer from California on supervision

Insofar as Fourth Amendment search issues are concerned, the most common condition found is consistent with the Model Penal Code § 301.1(2)(j) "to report as directed to the Court or the probation officer and to permit the officer to visit his home...." Many States adopting the (j) provision add "and elsewhere." A few States provide, in one form or another for the MPC § 301.1(2)(l) "to satisfy any other conditions reasonably related to the rehabilitation of the defendant and not unduly restrictive of his liberty or incompatible with his freedom of conscience." *See* Appendix B. Only two states, Illinois and North Carolina, have a detailed procedure for warrantless searches by a probation officer. Many States expressly provide for drug testing. No state, by statute, expressly permits a warrantless search by peace officers. *See* Appendix B.

in Illinois is subject to "visits by the probation officer at the probationer's home or place of work at reasonable times." Twenty-seven jurisdictions have express statutory provisions for either visits, searches, or both, limited to the probation officer; one permits the probation officer to use peace officers; none permit a peace officer to conduct searches. Twenty-seven jurisdictions have no express statutory provision for visits or searches by anyone; of these, one, New Mexico, by administrative regulation, prohibits a probation officer from conducting searches, requiring the officer to pursue normal search procedures, but by case law allows a probation officer to conduct searches. Courts in sixteen of the fifty-four jurisdictions surveyed have considered the issue. Two, Arkansas and Georgia, give greater latitude than expressly permitted by statute. In the Arkansas case, on state grounds, the scope of the statute limiting searches to probation offers was not discussed; the discussion centered only on federal grounds and the 4th Amendment, pursuant to Griffin. Eight found that the conditions imposed were rationally related to a legitimate purpose of rehabilitating the probationer. Only five were faced with a state statute which had no express provisions for visits or searches and of those five, only California permits "blanket searches." See footnote 5 and Appendix B.

A requirement that the several States by legislation authorize in the first instance the waiver of Fourth Amendment rights, with necessary safeguards, is essential in view of the importance of this issue, in order to give clear notice to those who must administer the program and those who must abide by the terms, provide clear guidance to probationers on their duties and responsibilities, provide for uniform treatment of probationers who are subject to relocation and transfer, and to assure that appropriate consideration is given to third parties and potential bystanders whose rights should not be impaired by unreasonable conditions of probation and parole.

B. This Court Held in *Griffin* that a State Does Have a Limited Interest in Close Supervision of Those *In Custodia Legis*

Regardless of the applicable standard, a probationer's, or parolee's home, like everyone else's, is protected by the Fourth Amendment's requirement that searches be "reasonable." *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (probationer).[4] Supervision is a special need of the state permitting a degree of impingement upon privacy that would not be constitutional if applied to the public at large, but the permissible degree is not unlimited. 483 U.S. at 875. The "special needs" of a probation system make the warrant system impracticable and justify the replacement of the standard of probable cause by "reasonable ground." 483 U.S. at 875-76.

[4] The Court did not reach the question as to when a police officer could search. In *Griffin*, the police officer reported that he thought the probationer had a gun, but it was the probation officer, not the police, who conducted the search.

In most jurisdictions, the result reached in *Griffin v. Wisconsin* had been a foregone conclusion, with other courts having moved in the direction of requiring at a minimum that a peace officer at least have consulted with a probation officer.[5] It would appear that

[5] *E.g., State v. Cullison*, 173 N.W.2d 533 (Iowa 1970) (parolee; unreasonable search); *People v. Way*, 319 N.Y.S.2d 16 (New York 1971)(parolee; limited scope); *People v. Peterson*, 233 N.W.2d 250, 254-55 (Mich. 1975) (blanket searches by peace officers unlawful); *Temez v. State*, 534 S.W.2d 686 (Tex. 1976); *State v. McGivney*, 585 P.2d 767 (Ore 1978); *State v. Holm*, 579 P.2d 860 (Ore. 1978) (probation Officer; "any peace officer" too broad); *Dearth v. State*, 390 So.2d 108 (Fla. App. 1980) (conditions of probation; fact that probationer agreed to "unfettered discretion" does not make void condition voluntary); *State v. Fogarty*, 610 P.2d 140 (Mont. 1980) (probation; search condition unconstitutional); *State v. Fields*, 686 P.2d 1379, 1389 (Haw. 1984)(probation; probable cause required); *Commonwealth v. La France*, 525 N.E.2d 379 (Mass. 1988) (search by probation officer); *People v. Hellenthal*, 465 N.W.2d 329 (Mich. 1990); *State v. Gallagher*, 675 P.2d 429 (N.M. 1984); *State v. Cumming*, 262 N.W.2d 56 (S.D. 1978) (probation officer consent required); *State v. Gardner*, 619 P.2d 847 (N.M. 1980) (state statute silent; administrative code required probation officer to seek search warrant, but actual condition imposed provided that probation officer could conduct search; search led by probation officer valid); *State v. Perbix*, 331 N.W.2d 14 (ND. 1983) (search consistent with statutes permitting probation officer to search) [*see now* N.D.C.C. 15A-1343 adopting MOC (j)]. *But see People v. Bravo*, 43 Cal.3d 600 (1987); *Wilson v. State*, 752 S.W.2d 46 (Ark. 1988) [*see now* A.C.A. § 5-4-303 adopting MPC (j)]; *Allen v. State*, 369 S.E.2d 909 (Ga. 1988) [*see now* O.C.G.A. § 45-8-35 adopting MPC (j); *State v. Finnegan*, 439 N.W.2d 496 (Neb. 1989) (search "by any peace officer" limited to part of drug rehabilitation program only); *People v. Hellenthal*, 465 N.W.2d 329 (Mich. 1990) (drug search as part of drug rehabilitation program approved). *See generally*, Annotation, *Validity of Requirement that, As Condition of Probation, Defendant Submit to Warrantless Searches*, 79 A.L.R. 3d 1083;

California is the first state ever to expressly authorize "blanket searches" of probationers without a warrant by any peace officer. *People v. Bravo*, 43 Cal.3d 600 (1987). *Bravo*, however, was decided only several days after *Griffin*, and cites *Griffin* only once. 43 Cal.3d at 608. *Bravo* conflicts with *Griffin* in that California had no state detailed regulation of probation, unlike Wisconsin, which authorized a departure from Fourth Amendment warrants. In *Griffin*, there was an objective standard, approved by the Court, which had to be met over and above being a mere parolee, and there were detailed regulations covering the subject.

The Oregon experience is illuminating. The Supreme Court of Oregon noted that while the courts had the power to impose conditions of probation, and that while a "search and seizure" condition may be appropriate, there was no express legislative authority, such conditions could not be unlimited, and that the courts were not the means of defining that limit in the first instance, but did so reluctantly. Evidently the Oregon legislature took the hint because it appears to have enacted legislation permitting a "search and seizure" condition "by the probation officer, or any peace officer assisting the probation officer." *State v. Hovater*, 588 P.2d 56 (1978); *State v. Davis*, 597 P.2d 1280 (1979).

The great weight of authority thus holds that neither a parolee nor a probationer may be abused during authorized searches. Given the purpose of probation and parole, the fact that the probation and parole officers know their own charges better than anyone else, and certainly more than a magistrate knows about unknown citizens when issuing a search warrant, the Fourth Amendment requires at a minimum that peace officers contact the

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Annotation, *Validity, Under Fourth Amendment, of Warrantless Search of Parolee or His Property by Parole Officer*, 32 A.L.R. Fed 155.

parole or probation officer for permission to conduct a search of the parolee or probationer, and no search unless so authorized is valid, absent exigent circumstances, because the administration of conditions of parole and probation are a non-delegable duty necessary to rehabilitate the offender, yet prevent the exploitation of such persons and the abuse of those not on probation. This result is consistent with, and required by, this Court' enunciated rule of law which forbids the granting of "unfettered discretion" to peace officers in the area of law enforcement. *E.g.*, *Florida v. Wells*, 95 U.S. 1 (1990) (inventory of containers where no state policy authorizes inventory); *Payton v. New York*, 45 U.S. 573 (1980); 3 Rotunda, CONSTITUTIONAL TREATISE, § 20.9, p. 34. It is for the courts to supervise probationers, through the probation office, and not for peace officers, and such a delegation is simply not permitted.

C. CALIFORNIA HAS NO DETAILED RULES AND REGULATIONS FOR THE IMPOSITION OF A STATUTORY WAIVER OF THE FOURTH AMENDMENT FOR THOSE ON PROBATION

California's legislature has not clearly and unequivocally authorized a condition of probation searches "by any peace officer at any time of the day or night with or without a warrant, as a Condition of Probation. *See generally,* Cal. Pen. C. §§ 1192.3(a), 1202.7, 1202.8(a), 1203(a), 1203.016[6], 1203.1, 1203a, 1210.1.

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[6] This section, Electronic Home Detention Act of 1988, provides for home detention and electronic monitoring as a means of reducing local jail over crowding. It permits a peace officer, subject to the Detention Administrator, to inspect the home for compliance and take the person into custody without an arrest warrant when the system is not operational.

There is no basis for the Attorney General's reliance on Penal Code § 1000.12 or § 3067. The former has to do with Delayed Entry of Judgment (DEJ), a form of diversion wherein the defendant, without a judgment being entered, is placed under the custody of a probation officer for a period of rehabilitation. It is designed solely for child abuse/molestation cases, and not available to other offenses. California Stats. 1995, Chap. 935 (Appendix, at C1), which enacted § 1000.12 (DEF) and two versions of § 1203.066 (Probation).[7] Chapter 935 provides for "search any time of the day or night" for those on DEF, but not for those on probation. Surely, with the condition under consideration for DEJ, the legislature could not have overlooked the possibility and failed to duplicate the condition for probation, had they desired it. It is circumstantial evidence, in light of the sister state legislation and other Supreme Court decisions, to reject the holding of *People v. Bravo*, 43 Cal.3d 600 (1987) and not to vest peace officers with unfettered discretion in cases of probation. The latter provisions, Pen. Code § 3067, is not relevant because that provision deals with those on parole, *i.e.* a period of supervision after having served a period of time in state prison.

This court's decision in *Colonnade, supra*, is directly on point: absent legislative approval in the first instance, the regulation is void for lack of authority. Moreover, as discussed above, an overwhelming number of state supreme courts agree that such a provision is unconstitutional and therefore void.

[7] This case involved a question concerning conditions of probation, neither DEJ nor parole. However, it is difficult in light of the overwhelming evidence that unfettered discretion for such services is impermissible to justify such a condition with respect to either Pen. Code § 1000.12(c)(4)(4) or § 3067.

CONCLUSION

WHEREFORE, for the reasons set forth above, the Court's *amicus* respectfully submits that this Court should affirm the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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August 21, 2001

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Colo. Rev. Stat. § 16-11-204(i)
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Conn. Gen. Stat. §§ 54-132 to 54-138
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APPENDIX B

Section 1: Jurisdictions incorporating Model Penal Code §301.1(2)(j), requiring probationers "to report as directed to the Court or the probation officer and to permit the officer to visit his home ....":

State	As of 1993	As of 2001
Ark	Code Ann. § 54-303	To Section 2a
Ga	O.C.G.A. § 45-8-35	To Section 2
Ind	A.I.C. 35-38-2-2.3	To Section 2
Kan	S.A. 21-4610	To Section 2
Ky	RS 533.030	To Section 2
La	RS. 15:574.4	To Section 2
Me	R.S.A. § 1204	To Section 2
Neb	R.R.S. 1993, § 29-2262	R.R.S. 1993, § 29-2262(2)(k)
N.J	S.A. 2C:45-1	S.A. 2C:45-1(b)(10)
N.Y	Penal Law § 65.10	To Section 2
Pa.	42 Pa CSA § 9754	42 Pa CSA § 9754(C)(10)

Section 2: Jurisdictions incorporating Model Penal Code §301.1(2)(j) and adding "and elsewhere:"

State	As of 1993	As of 2001
US	18 USC, § 3563	18 USC, § 3563
Al	From Section 6	15-22-52(4)
Ark	Code Ann. § 54-303	Code Ann. § 54-303
Colo	R.S.A. § 16-11-204(i)	16-11-204(2)(x)
Fla.	S.A. § 948.03	S.A. § 948.03(1)(b)
Ga	From Section 1	O.C.G.A. § 42-8-35(4)
Hawaii	RS § 706-624	RS § 706-624(f)
Ill.	730 ILCS 5/5-6-3	730 ILCS 5/5-6-3(a)(5) & 3.1
Ind.	From Section 1	AIC 35-38-2-2.3(a)(10)
Kan.	From Section 1	S.A. 21-4610(c)(4)
Ky	From Section 1	RS 533.030(2)(j)

La	From Section 1	CCRP 895(4)
Me	From Section 1	17-49-1204.2-A(j)
Miss	Code 1972, § 47-7-35	Code 1972, § 47-7-35(e)
N.D.	C.C. § 12.1-32-07*	C.C. § 12.1-32-07.4(h)
N.Y	From Section 1	Penal Law § 65.10.2(a)
Ore	RS § 137.540	RS § 137.540
Vt	Stat 28 § 252*	Stat 28 § 252(b)(10)*

* Limited to Reasonable times.

Section 2a: Jurisdictions using an analogous Model Penal Code § 301.1(2)(j), requiring probationers "to report as directed to the Court or the probation officer and to permit the officer to visit his work, and elsewhere ....":

State	As of 1993	As of 2001
Ark	New	Code Ann. § 5-4-303(2)(j)

Section 3: Jurisdictions incorporating Model Penal Code §301.1(2)(l), requiring probationers "to satisfy any other conditions reasonably related to the rehabilitation of the defendant and not unduly restrictive of his liberty or incompatible with his freedom of conscience":

State	As of 1993	As of 2001
US	18 USC, § 3563	18 USC, § 3563(b)
Ark	Code Ann. § 54-303	Code Ann. § 54-303(e)(1)
Hawaii	RS § 706-624	RSs § 706.624(2)
Ill	730 ILCS 5/5-6-3	730 ILCS 5/5-6-3
N.J	N.J.S.A. 2C:45-1(b)(12)	N.J.S.A. 2C:45-1(b)(12)
Pa.	Stat. 42 § 9754	42 Pa CSA § 9754(c)(13)

Section 4: Jurisdictions with detailed procedures for warrantless searches by a probation officer:

State	As of 1993	As of 2001
Ill	730 ILCS 5/5-6-3	730 ILCS 5/5-6-3(a)(5)
N.C.	G.S. § I5A-1343(b)(5)	G.S. § I5A-1343(b)(3)*
Ohio	New	ORC 2951.02(C)(2)*

* Limited to searches by probation officers

Section 5: Jurisdictions that expressly provide for drug testing:

State	As of 1993	As of 2001
US	18 USC, § 3563	18 USC, § 3563
Ariz	R.S. §13-914	R.S. §13-914
Fla.	S.A. § 948.03	S.A. § 948.03(2)
Hi.	RS § 706-624	RS § 706-624
Il.	CS 5/3-6-3 S.H.A. 730	CS 5/3-6-3 S.H.A. 730
Ind.	A.I.C. 35-38-2-2.3	A.I.C. 35-38-2-2.3(a)(10)
Md	New	Art 27, § 64(a)(1)(ii)1.
Me	R.S.A. § 1204	R.S.A. § 1204
MI	New	773.1(2)(g)
Miss	Code 1972, § 47-7-35	Code 1972, § 47-7-35
Neb.	R.R.S. 1993, § 29-2262	R.R.S. 1993, § 29-2262(2)(n)
Nev	R.S. 176.185 to 176.227	R.S. 176.185 to 176.227
N.D.	C.C. § 12.1-32-07	C.C. § 12.1-32-07
Ok.	New	St. Anno. 2.2-991, 991A.1.k., .p, & .y
Ore.	RS § 137.540	RS § 137.540
Puerto Rico	Law 34 § 1027a	Law 34 § 1027a
Tex	Ann. C.Cr.P. art. 42.12, § 11	Ann. C.Cr.P. art. 42.12, § 11

Section 6: Jurisdictions silent on the issue of consent to search:

State	As of 1993	As of 200i
US	18 USC, § 3563	18 USC, § 3563
Ala.	Code 1975, § 15-22-29	Code 1975, § 15-22-29
Alaska	Stat. § 12.55.100	Stat. § 12.55.100
Ariz.	R.S. §§ 12-299, et seq.	R.S. §§ 13-901 et seq.
Cal.	Pen. C. §§ 11175to11179	Pen. C. §§1203, 1203.1, 11175to11179
Conn.	G.S.A. § 53a-30	G.S.A. § 53a-30
Del.	Code 11 § 4332	Code 11 § 4332
D.C.	Code 1981, §§ 24-101 to 24-106	Code 1981, §§ 24-101 to 24-106
Idaho	C. §§ 19-2601 to 19-2607	C. §§ 19-2601 to 19-2607
Iowa	C.A. § 907.6	C.A. § 907.6
Md.	Code 1957, art. 27, § 641, 641A	Code 1957, art. 27, § 641, 641A
Mass	G.L.A. C. 276, § 387, 387A	G.L.A. C. 276, § 387, 387A
Mich	C.L.A. § 771.3	C.L.A. § 771.3
Minn	S.A. § 609.135	S.A. § 609.135
Mo.	V.A.M.S. § 217.705	V.A.M.S. § 217.705, 559.016
Mont.	CA §§ 46-1-202, 46-18-201, 46-23-1001	CA §§ 46-1-202, 46-18-201, 46-23-1001
N.H.	RSA *651:2*	RSA *651:2*
N.M	.S.A. 1978, § 31-21-21	.S.A. 1978, § 31-21-21
Ohio	R.C. § 2951.02	R.C. § 2951.02????(c)(1)
Okl	St. Ann. 22 § 991a	St. Ann. 22 § 991a
R.I.	G.L. 1956 §§ 12-19-8, 21-284.21	GL. 1956 § 12-18.1-1
S.C.	Code 1976 § 24-21-430	Code 1976 § 24-21-430
S.D.	C.L. 23A-27-18	C.L. 23A-27-18
Tenn	C.A. § 40-35-303	C.A. § 42.01
Utah	Code 1953 § 77-18-1	Code 1953 § 77-18-1
Virgin	Code S § 3711	Code S § 3711

Islands		
Va.	Code 1950, § 19.2-303	Code 1950, §§ 19.2-123, 19.2-303
Wash.	Rev. Code § 9-95-210	Rev. Code § 9-95-210
W.Va.	Code § 62-12-9	Code § 62-12-9
Wis.	S.A. § 973.09	S.A. § 973.09
Wyo.	Stat. 1977 § 7-13-30	Stat. 1977 § 7-13-30

Section 6: Jurisdictions expressly permitting search and seizures by any peace officer at any time:

State	As of 1993	As of 2001
CA	-----	P.C. § 1000.12(c)(4)(D)*

*DEJ, not probation, and limited to those involved in child abuse/molestation.

APPENDIX C

CALIFORNIA STATUTES

BILL NUMBER: SB 816 CHAPTERED 10/16/95
[**1995** Stats.] CHAPTER 935

FILED WITH SECRETARY OF STATE
OCTOBER 16, **1995**

APPROVED BY GOVERNOR OCTOBER 15, **1995**

PASSED THE SENATE SEPTEMBER 13, **1995**

PASSED THE ASSEMBLY SEPTEMBER 1, **1995**

AMENDED IN ASSEMBLY AUGUST 31, **1995**

AMENDED IN ASSEMBLY AUGUST 24, **1995**

AMENDED IN ASSEMBLY JULY 5, **1995**

AMENDED IN SENATE MAY 23, **1995**

AMENDED IN SENATE MAY 17, **1995**

INTRODUCED BY Senator Peace

(Coauthor: Senator Kopp)

(Coauthor: Assembly Member Rainey)

FEBRUARY 23, **1995**

An act to amend Section 13964 of the Government Code,

to amend Sections 288.1, 1000.12, and 1203.066 of the Penal Code, and to amend Section 656 of the Welfare and Institutions Code, relating to children.

LEGISLATIVE COUNSEL'S DIGEST

SB 816, Peace. Children: sexual abuse.

(1) Existing law authorizes the State Board of Control to provide assistance to, among others, derivative victims of crimes, including the parent of a child who has been sexually abused, unless the board makes certain findings, including the fact that the parent failed to cooperate with a law enforcement agency in the apprehension and conviction of the perpetrator. This bill would specify that a parent shall not be considered uncooperative under these provisions if the parent cooperates with the prosecution or Child Protective Services by providing assistance to law enforcement in the disposition of the case.

(2) Existing law provides for the granting of probation to, and deferred entry of judgment and treatment of, specified child **molester** who may be feasibly rehabilitated in recognized treatment programs. This bill would revise the standards applicable to a recognized treatment program, as defined.

(3) Existing law provides that the court may not suspend the sentence of a specified child **molester** until the court obtains a report on the offender's mental condition from a reputable psychiatrist or psychologist, as provided. This bill instead would provide that the court may not suspend the sentence of a specified child **molester** until the court obtains that report from a reputable psychiatrist or psychologist, or from a recognized treatment program referred to in (2) above. The bill would make various

technical changes.

(4) This bill would incorporate additional changes in Section 656 of the Welfare and Institutions Code enacted by AB 817 (Ch. 313, Stats. **1995**). This bill would incorporate additional changes in Section 1203.066 of the Penal Code enacted by AB 1491 (Ch. 48, Stats. **1995**). It would also incorporate additional changes in that section proposed by AB 95, to be operative only if AB 95 and this bill are both chaptered and become effective on January 1, 1996, and this bill is chaptered last.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 13964 of the Government Code is amended to read:

*****

SEC. 2. Section 288.1 of the Penal Code is amended to read:

*****

SEC. 3. Section 1000.12 of the Penal Code is amended to read:

1000.12. (a) It is the intent of the Legislature that nothing in this chapter deprive a prosecuting attorney of the ability to prosecute any person who is suspected of committing any crime in which a minor is a victim of an act of **molester**, abuse, or neglect to the fullest extent of the law, if the prosecuting attorney so chooses.

(b) Except as provided in subdivision (c), in lieu of

prosecuting a person suspected of committing any crime, involving a minor victim, of an act of abuse or neglect, the prosecuting attorney may refer that person to the county department in charge of public social services or the probation department for counseling or psychological treatment and such other services as the department deems necessary. The prosecuting attorney shall seek the advice of the county department in charge of public social services or the probation department in determining whether or not to make the referral.

(c) (1) In lieu of trial, the prosecuting attorney may make a motion to the trial court to defer entry of judgment with respect to any crime charged in which a minor is a victim of an act of **molester** or sexual abuse, provided that the defendant pleads guilty to all crimes and enhancements charged. Upon that motion and defendant's plea of guilty to all charges and enhancements, the court may defer entry of judgment, contingent upon the defendant's referral to, and completion of, a treatment program approved by the prosecuting attorney. Upon the defendant's successful completion of the treatment program, and upon the positive recommendation of the treatment program authority and the motion of the prosecuting attorney, but no sooner than five years from the date of the defendant's referral to the treatment program, the court shall dismiss the charge or charges against the defendant.

(2) Upon any failure of treatment under the program described in paragraph (1), the prosecuting attorney may make a motion to the court for entry of judgment and the court shall, upon a finding of failure of treatment based on a preponderance of evidence, enter judgment upon the defendant's pleas and admissions, and schedule a sentencing hearing as otherwise provided in this code.

(3) The office of the prosecuting attorney shall promulgate eligibility standards for deferred entry of judgment and treatment of defendants described in paragraph (1), which shall include, but not be limited to, all of the following:

(A) Deferred entry of judgment for the defendant is in the best interests of the minor victim.

(B) Rehabilitation of the defendant is feasible in a recognized treatment program, as defined in Section 1203.066, designed to deal with child **molester**, abuse, or neglect, as specifically related to the charges made.

(C) There is no threat of harm to the minor victim if entry of judgment is deferred.

(D) No person shall be deemed eligible for deferred entry of judgment under this section unless he or she pleads guilty to all charges and enhancements.

(E) Deferred entry of judgment shall not apply to any person who is charged under subdivision (b) of Section 288, or any sexual offense involving force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the minor victim or another person.

(F) Any person who applies for deferred entry of judgment under this section shall also

meet all of the requirements for the counseling program delineated under Section 1000.13.

(4) Deferred entry of judgment shall be granted upon the following terms:

(A) Defendant shall seek and participate in a rehabilitation program as prescribed by the district attorney.

(B) Defendant shall not use, handle, or have in his or her possession marijuana, narcotics, dangerous drugs, or controlled substances of any kind, unless lawfully prescribed for the defendant by a licensed physician.

(C) Defendant shall not associate with known or reputed users or sellers of marijuana, dangerous drugs, or narcotics, or be in places where narcotics or dangerous drugs are present.

(D) Defendant shall submit his or her person, property, automobile, and any object under his or her control to *search* and seizure in or out of the presence of the defendant, by any law enforcement officer or probation officer.

(E) Unification with the family or unsupervised contact with the minor victim or any other minor shall be prohibited except upon recommendation of the treatment program and motion of the district attorney and order of the

court.

(F) Any violation of the law constitutes a failure of treatment.

SEC. 4. Section 1203.066 of the Penal Code is amended to read:

1203.066. (a) Notwithstanding Section 1203 or any other law, probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for, nor shall a finding bringing the defendant within the provisions of this section be stricken pursuant to Section 1385 for, any of the following persons:

(1) A person who is convicted of violating Section 288 or 288.5 when the act is committed by the use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.

(2) A person who caused bodily injury on the child victim in committing a violation of Section 288 or 288.5.

(3) A person who is convicted of a violation of Section 288 or 288.5 and who was a stranger to the child victim or befriended the child victim for the purpose of committing an act in violation of Section 288 or 288.5, unless the defendant honestly and reasonably believed the victim was 14 years of age or older.

(4) A person who used a weapon during the commission of a violation of Section 288 or 288.5.

(5) A person who is convicted of committing a violation of Section 288 or 288.5 and who has been previously convicted of a violation of Section 261, 262, 264.1, 266, 266c, 267, 285, 286, 288, 288.5, 288a, or 289, or of assaulting another person with intent to commit a crime specified in this paragraph in violation of Section 220, or who has been previously convicted in another state of an offense which, if committed or attempted in this state, would constitute an offense enumerated in this paragraph.

(6) A person who violated Section 288 or 288.5 while kidnapping the child victim in violation of Section 207, 208, or 209.

(7) A person who is convicted of committing a violation of Section 288 or 288.5 against more than one victim.

(8) A person who, in violating Section 288 or 288.5, has substantial sexual conduct with a victim who is under 14 years of age.

(9) A person who, in violating Section 288 or 288.5, used obscene matter, as defined in Section 311, or matter, as defined in Section 311, depicting sexual conduct, as defined in Section 311.3.

(b) "Substantial sexual conduct" means penetration of the vagina or rectum of either the victim or the offender by the penis of the other or by any foreign object, oral copulation, or masturbation of either the victim or the offender.

(c) Paragraphs (7), (8), and (9) of subdivision (a) shall not apply when the court makes all of the following findings:

(1) The defendant is the victim's natural parent, adoptive parent, stepparent, relative, or is a member of the victim's household who has lived in the victim's household.

(2) A grant of probation to the defendant is in the best interest of the child.

(3) Rehabilitation of the defendant is feasible, the defendant is amenable to undergoing treatment, and the defendant is placed in a recognized treatment program designed to deal with child **molestation** immediately after the grant of probation or the suspension of execution or imposition of sentence.

(4) The defendant is removed from the household of the victim until the court determines that the best interests of the victim would be served by returning the defendant to the household of the victim. While removed from the household, the court shall prohibit contact by the defendant with the victim, except the court may permit the supervised contact, upon the request of the director of the court ordered supervised treatment program, and with the agreement of the victim and the victim's parent or legal guardian, other than the defendant. As used in this paragraph, "contact with the victim" includes all physical contact, being in the presence of the victim, communication by any means, any communication by a

third party acting on behalf of the defendant, and any gifts.

(5) There is no threat of physical harm to the child victim if probation is granted. The court upon making its findings pursuant to this subdivision is not precluded from sentencing the defendant to jail or prison, but retains the discretion not to do so. The court shall state its reasons on the record for whatever sentence it imposes on the defendant. The court shall order the psychiatrist or psychologist who is appointed pursuant to Section 288.1 to include a consideration of the factors specified in paragraphs (2), (3), and (4) in making his or her report to the court.

(d) The existence of any fact that would make a person ineligible for probation under subdivision (a) shall be alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the jury trying the issue of guilt or by the court where guilt is established by plea of guilty or nolo contendere or by trial by the court sitting without a jury.

(e) As used in this section and in Section 1000.12, the following terms apply:

(1) "Recognized treatment program" means a program with substantial expertise in the treatment of children who are victims of sexual abuse, their families, and offenders, that demonstrates to the court all of the following:

(A) An integrated program of treatment and assistance to victims and their families.

(B) A treatment regimen designed to specifically address the offense.

(C) The ability to serve indigent clients.

(2) "Integrated program of treatment and assistance to victims and their families" means that the program provides all of the following:

(A) A full range of services necessary to the recovery of the victim and any nonoffending members of the victim's family, including individual, group, and family counseling as necessary.

(B) Interaction with the courts, social services, probation, the district attorney, and other government agencies to ensure appropriate help to the victim's family.

(C) Appropriate supervision and treatment, as required by law, for the offender.

(f) For purposes of this section and Section 1000.12, a program that provides treatment only to offenders and does not provide an integrated program of treatment and assistance to victims and their families is not a recognized treatment program.

SEC. 5. Section 1203.066 of the Penal Code is amended to read:

1203.066. (a) Notwithstanding Section 1203 or any other law, probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for, nor shall a finding bringing the defendant within the provisions of this section be stricken pursuant to Section 1385 for, any of the following persons:

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(2) A person who caused bodily injury on the child victim in committing a violation of Section 288 or 288.5.

(3) A person who is convicted of a violation of Section 288 or 288.5 and who was a stranger to the child victim or befriended the child victim for the purpose of committing an act in violation of Section 288 or 288.5, unless the defendant honestly and reasonably believed the victim was 14 years of age or older.

(4) A person who used a weapon during the commission of a violation of Section 288 or 288.5.

(5) A person who is convicted of committing a violation of Section 288 or 288.5 and who has been previously convicted of a violation of Section 261, 262, 264.1, 266, 266c, 267, 285, 286, 288, 288.5, 288a, or 289, or of assaulting another person with intent to commit a crime specified in this paragraph in violation of Section 220, or who has been previously convicted in another state of an offense which, if committed or attempted in this state, would constitute an offense enumerated in this paragraph.

(6) A person who violated Section 288 or 288.5 while kidnapping the child victim in violation of Section 207, 209, or 209.5.

(7) A person who is convicted of committing a violation of Section 288 or 288.5 against more than one victim.

(8) A person who, in violating Section 288 or 288.5, has substantial sexual conduct with a victim who is under 14 years of age.

(9) A person who, in violating Section 288 or 288.5, used obscene matter, as defined in Section 311, or matter, as defined in Section 311, depicting sexual conduct, as defined in Section 311.3.

(b) "Substantial sexual conduct" means penetration of the vagina or rectum of either the

victim or the offender by the penis of the other or by any foreign object, oral copulation, or masturbation of either the victim or the offender.

(c) Paragraphs (7), (8), and (9) of subdivision (a) shall not apply when the court makes all of the following findings:

(1) The defendant is the victim's natural parent, adoptive parent, stepparent, relative, or is a member of the victim's household who has lived in the victim's household.

(2) A grant of probation to the defendant is in the best interest of the child.

(3) Rehabilitation of the defendant is feasible, the defendant is amenable to undergoing treatment, and the defendant is placed in a recognized treatment program designed to deal with child **molestation** immediately after the grant of probation or the suspension of execution or imposition of sentence.

(4) The defendant is removed from the household of the victim until the court determines that the best interests of the victim would be served by returning the defendant to the household of the victim. While removed from the household, the court shall prohibit contact by the defendant with the victim, except the court may permit supervised contact, upon the request of the director of the court-ordered supervised treatment program, and with the agreement of the victim and the victim's parent or legal guardian, other than the defendant. As used in this

paragraph, "contact with the victim" includes all physical contact, being in the presence of the victim, communication by any means, any communication by a third party acting on behalf of the defendant, and any gifts.

(5) There is no threat of physical harm to the child victim if probation is granted. The court upon making its findings pursuant to this subdivision is not precluded from sentencing the defendant to jail or prison, but retains the discretion not to do so. The court shall state its reasons on the record for whatever sentence it imposes on the defendant. The court shall order the psychiatrist or psychologist who is appointed pursuant to Section 288.1 to include a consideration of the factors specified in paragraphs (2), (3), and (4) in making his or her report to the court.

(d) The existence of any fact that would make a person ineligible for probation under subdivision (a) shall be alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the jury trying the issue of guilt or by the court where guilt is established by plea of guilty or nolo contendere or by trial by the court sitting without a jury.

(e) As used in this section and in Section 1000.12, the following terms apply:

(1) "Recognized treatment program" means a program with substantial expertise in the treatment of children who are victims of sexual abuse, their families,

and offenders, that demonstrates to the court all of the following:

(A) An integrated program of treatment and assistance to victims and their families.

(B) A treatment regimen designed to specifically address the offense.

(C) The ability to serve indigent clients.

(2) "Integrated program of treatment and assistance to victims and their families" means that the program provides all of the following:

(A) A full range of services necessary to the recovery of the victim and any nonoffending members of the victim's family, including individual, group, and family counseling as necessary.

(B) Interaction with the courts, social services, probation, the district attorney, and other government agencies to ensure appropriate help to the victim's family.

(C) Appropriate supervision and treatment, as required by law, for the offender.

(f) For purposes of this section and Section 1000.12, a program that provides treatment only to offenders and does not provide an integrated program of treatment and assistance to victims and their families is not a recognized treatment

program.

SEC. 6. Section 656 of the Welfare and Institutions Code, as amended by Chapter 313 of the Statutes of **1995**, is amended to read:

656. A petition to commence proceedings in the juvenile court to declare a minor a ward of the court shall be verified and shall contain all of the following:

(a) The name of the court to which it is addressed.

(b) The title of the proceeding.

(c) The code section and subdivision under which the proceedings are instituted.

(d) The name, age, and address, if any, of the minor upon whose behalf the petition is brought.

(e) The names and residence addresses, if known to petitioner, of both of the parents and any guardian of the minor. If there is no parent or guardian residing within the state, or if his or her place of residence is not known to petitioner, the petition shall also contain the name and residence address, if known, of any adult relative residing within the county, or, if there are none, the adult relative residing nearest to the location of the court.

(f) A concise statement of facts, separately stated, to support the conclusion that the minor upon whose behalf the petition is being brought is a person within the definition of each of the sections and subdivisions under which the proceedings are being instituted.

(g) The fact that the minor upon whose behalf the petition is brought is detained in custody or is not detained in custody, and if he or she is detained in custody, the date and the precise time the minor was taken into custody.

(h) A notice to the father, mother, spouse, or other person liable for support of the minor child, that:

(1) Section 903 may make that person, the estate of that person, and the estate of the minor child, liable for the cost of the care, support, and maintenance of the minor child in any county institution or any other place in which the child is placed, detained, or committed pursuant to an order of the juvenile court;

(2) Section 903.1 may make that person, the estate of that person, and the estate of the minor child, liable for the cost to the county of legal services rendered to the minor by a private attorney or a public defender appointed pursuant to the order of the juvenile court;

(3) Section 903.2 may make that person, the estate of that person, and the estate of the minor child, liable for the cost to the county of the probation supervision of the

minor child by the probation officer pursuant to the order of the juvenile court; and

(4) the liabilities established by these sections are joint and several.

(i) In a proceeding alleging that the minor comes within Section 601, notice to the parent, guardian, or other person having control or charge of the minor that failure to comply with the compulsory school attendance laws is an infraction, which may be charged and prosecuted before the juvenile court judge sitting as a municipal court judge. In those cases, the petition shall also include notice that the parent, guardian, or other person having control or charge of the minor has the right to a hearing on the infraction before a judge different than the judge who has heard or is to hear the proceeding pursuant to Section 601. The notice shall explain the provisions of Section 170.6 of the Code of Civil Procedure.

(j) If a proceeding is pending against a minor child for a violation of Section 594.2, 640.5, 640.6, or 640.7 of the Penal Code, a notice to the parent or legal guardian of the minor that if the minor is found to have violated either or both of these provisions that (1) any community service which may be required of the minor may be performed in the presence, and under the direct supervision, of the parent or legal guardian pursuant to either or both of these provisions; and

(2) if the minor is personally unable to pay any fine levied for the violation of either or both of these provisions, that the parent or legal guardian of the minor shall be liable for payment of the fine pursuant to those sections.

(k) A notice to the parent or guardian of the minor that if the minor is ordered to make restitution to the victim pursuant to Section 730.6, or to pay fines or penalty assessments, the parent or guardian may be liable for the payment of restitution, fines, or penalty assessments.

SEC. 7. Section 5 of this bill incorporates amendments to Section 1203.066 of the Penal Code proposed by both this bill and AB 95. It shall only become operative if (1) both bills are enacted and become effective on January 1, 1996, (2) each bill amends Section 1203.066 of the Penal Code, and (3) this bill is enacted after AB 95, in which case Section 4 of this bill shall not become operative.

Aug 22, 2001

(12)

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In The
Supreme Court of the United States

REC'D TEAM 93
AUG 31 2001
UNSCANNED

UNITED STATES OF AMERICA,
Petitioner,

v.

MARK JAMES KNIGHTS,
Respondent.

**On Writ of Certiorari To The
United States Court of Appeals
For the Ninth Circuit**

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS*[1]

The National Association of Criminal Defense Lawyers (NACDL) is the preeminent organization in the United States advancing the mission of America's criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. A professional bar association founded in 1958, NACDL's more than 10,400 direct members–and more than 80 state and local affiliate organizations with over 28,000 members–include private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors, and judges committed to preserving fairness within America's criminal justice system. The American Bar Association recognizes NACDL as an affiliate organization and grants it full representation in its House of Delegates.

NACDL promotes study and research in the field of criminal law to disseminate and advance knowledge of the law in the area of criminal practice. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring that legal proceedings are handled in a proper and fair manner. Among NACDL's objectives is promotion of the proper administration of justice. In furtherance of that objective, over the last decade, NACDL has filed approximately ten *amicus* briefs per year with this Court on criminal justice related issues.

NACDL members regularly litigate the issues involved in

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[1] Pursuant to S.Ct. Rule 37.6, counsel certifies that no counsel for party authored any part of this brief. No person or entity other than *amicus* made a monetary contribution to the preparation or submission of the brief.

Pursuant to S.Ct. Rule 29.6 on Corporate Disclosure Statements, NACDL is a nonprofit corporation. It has no parent corporation, and it is not a publicly held corporation, nor does a publicly held company own 10% or more of its stock.

this case, so they have an intimate awareness of the practical effects of probation on their clients and issues involving revocation of probation, including under search conditions as involved in this case.

The parties have consented to NACDL filing this *amicus* brief on behalf of the respondent, and the letters of consent are filed with this brief.

SUMMARY OF THE ARGUMENT

I. This is not a probation search because a probation officer was not involved. It is a probation search in name only because California caselaw permits law enforcement officers to conduct searches of probationers without legal justification. Probation and parole officers, "in contrast to police officers, are not engaged in the often competitive enterprise of ferreting out crime." Because they are engaged in law enforcement and not probation supervision, their goal is not maintenance of supervision–it is arrest and prosecution.

Probation is a necessary part of the criminal justice system. Not all offenders and offenses warrant incarceration, and probation can be summary, as in this case, or require intense supervision. Supervision is tailored to the needs of the offender. Indeed, for some offenders, incarceration or overly intensive supervision may be counterproductive and increase the likelihood of recidivism.

Amicus's recidivism statistics are different than those offered by the government's *amici,* and they show that fewer people recidivate than expected.

While probation and parole are necessary, may all probationers be constitutionally required to submit to searches of their homes as a condition of probation? This search was solely for law enforcement purposes, and there was no true consent beyond a court order or submission to a claim of lawful authority. This search fails every standard under which the

government seeks to justify it: the familiar rules of concerning the sanctity of the probationer's home, a probationer's knowing and voluntary waiver of consent to blanket searches without any justification by law enforcement officers investigating crime and not probation officers supervising them, reasonableness of a search under the totality of circumstances, and the "special needs" exception.

II. This warrantless police search of the home is presumptively unreasonable. An analysis of Fourth Amendment "reasonableness" involving the home requires a sensitive inquiry into the interests involved. Thus, warrantless entries into the home, even of the home of a probationer, are presumed unreasonable, and the government has a much heavier burden to sustain them.

Warrantless probationer searches of a probationer's home in California are no different than the "writs of assistance," "general warrants," or "roving commissions" condemned by the Framers of the Fourth Amendment.

III. The ultimate question in consent to search cases is voluntariness on the "totality of the circumstances." California probationers have no right to refuse such search conditions. Mere acquiesce to a claim of authority is not consent, and that is just what this case involves. There is no showing that this was a bargained for condition; it is routinely imposed without regard to the crime or the requirements of the offender. Consent is determined by objective standards, reviewing the totality of the circumstances. That makes this search unreasonable. The objective effect of these search conditions is a pretextual criminal investigatory search, and that also makes it unreasonable.

California probationers are subjected to a greater deprivation of liberty in these search conditions that federal parolees because only a federal parole officer can conduct a federal parole search. Everywhere other than California, the search term must bear some relation to the offender or the offense.

IV. The search also cannot be justified under the "special needs" exception because the programmatic purpose of these searches is criminal investigatory searches. No "special needs" case supports this form of search, and all of them require it be found unconstitutional.

Even balancing the interests involved still favors the accused, considering the fact that a home is the object of the search.

ARGUMENT

I. Introduction

A. What this case is and what it is not

The government does not contend that this search is a "probationer search" in the traditional sense of what that connotes: a probation officer making a home visit or, having a reason to believe that his or her charge is violating a law, bringing along a law enforcement officer to conduct a search, and that is a vital distinction. No one contends that bona fide probationer searches done by or at the behest of probation officers are invalid. Indeed, they are necessary to the successful operation of the probation and parole system. *Griffin v. Wisconsin,* 483 U.S. 868, 873-74 (1987).

The probation and parole system depends upon a probation officer-probationer relationship that is "more supervisory than adversarial." *Pennsylvania Board of Probation and Parole v. Scott,* 524 U.S. 357, 368 (1998), citing *Griffin,* 483 U.S. at 879.[2] The California "Fourth Waiver" rule, however,

[2] Government's *amicus* Criminal Justice Legal Foundation (CJLF) observes that probation officers are not the ideal candidates to be searching their clients because of lack of training, and it uses this as a justification for permitting law enforcement officers to

flouts this requirement. Probation and parole officers, "in contrast to police officers, are not engaged in the often competitive enterprise of ferreting out crime." *Scott,* 524 U.S. at 368, quoting *United States v. Leon,* 468 U.S. 897, 914 (1984), citing *United States v. Chadwick,* 433 U.S. 1, 9 (1977), quoting *Johnson v. United States,* 333 U.S. 10, 14 (1948).[3] Because they are engaged in law enforcement and not probation supervision, their goal is not maintenance of supervision–it is arrest and prosecution, pure and simple.

California's "Fourth Waiver" is contrary to the foundation of this Court's holding in *Griffin* and every case of this Court concerning the sanctity of the home, Fourth Amendment reasonableness, and knowing and voluntary consent. "A

have blanket search power over probationers. CJLF Br. at 11-12.

To the contrary, federal and state probation officers are trained in the use of force and search and seizure, and they have been since 1991. If there is a serious threat to safety, then law enforcement officers should be called in to assist. As to federal probation officers, *see:* Paul W. Brown, *The Continuum of Force in Community Supervision,* 58 FED. PROB. 31 (No. 4, Dec. 1994); Earnest J. DelGrasso, *Probation Officer Safety and Defensive Weapons: A Closer Look,* 61 FED. PROB. 45 (No. 2, June 1997); Paul W. Brown & Mark J. Maggio, *The Evolution of Officer Safety Training in the Federal Probation and Pretrial Services System,* 61 FED. PROB. 26 (No. 4, Dec. 1997).

[3] *Johnson* states, 333 U.S. at 13-14:

> The point of the Fourth Amendment, which is not often grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

probationer's home, like anyone else's, is protected by the Fourth Amendment's requirement that searches be 'reasonable.'" *Griffin*, 483 U.S. at 873.

B. An overview of probation and parole, its need as a criminal sanction, supervision, and recidivism rates

According to the Department of Justice's Bureau of Justice Statistics (BJS), found at the DOJ website, at the end of 1999 over two million Americans were incarcerated[4] and nearly 4.5 million were on probation or parole for misdemeanors and felonies.[5] Since 1996, over one million people have been convicted of felonies every year.[6] Obviously, not all of them go to prison. It is neither possible nor productive to society.[7]

Probation varies greatly with the gravity of the offense. It can be "summary probation" and extremely minor and unintrusive, as in respondent's case, where the offender never even has to report to a probation officer (let alone be supervised by one), or it can be extremely intense where the offender has to submit to random drug screens by being summoned in virtually daily by a computer generated telephone call, electronic monitoring, and regular home visits by his or her probation officer. 2 NEIL P. COHEN, THE LAW OF PROBATION AND PAROLE ch. 17 (3d ed. 1999).[8]

The government's *amici* imply that probation is necessary only because we do not have enough prison bed space to incarcerate every felon. Probation and parole professionals could not disagree more, and no *amicus* weighing in for the government involves any probation and parole professionals.[9]

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[4] http://www.ojp.usdoj.gov/bjs/pub/pdf/p00.pdf.

[5] http://www.ojp.usdoj.gov/bjs/pub/pdf/pp99pr.pdf.

[6] http://www.ojp.usdoj.gov/bjs/stssent.htm.

[7] *Amici* State of California and CJLF assert that without a viable "Fourth Waiver" provision, many more probationers will go to prison instead because the courts will refuse to impose probation without it. Calif. Br. at 10; CJLF Br. at 12-13. No other state seems to have this problem, and it is difficult to grasp the logic behind such a claim.

[8] *Id.* § 17:6:

> While large numbers of probationers and parolees are under actual supervision, some are released without any supervision at all. This frequently occurs when persons charged with minor offenses are placed on probation for a short period of time. Often the only condition is that they refrain from new criminal activity during the probation term.
>
> Unsupervised probation and parole have several advantages. First, this approach recognizes that some offenders do not need to be supervised. Their offense may have been the product of a unique situation that is unlikely to occur again. Another example is the seriously ill offender who is physically unable to leave home and does not need supervision to prevent recidivism. Second, by using unsupervised release for some offenders, the jurisdiction can focus its scarce resources on those persons most in need of intensive supervision. Despite the advantages of unsupervised probation or parole in appropriate cases, some authorities reject the concept, often reflexively rather than logically.

See also Minnesota v. Murphy, 465 U.S. 420, 432 (1984) ("the nature of probation is such that probationers should expect to be questioned on a wide range of topics relating to their past criminality.").

[9] *Amicus* State of California is the prosecuting authority that first charged respondent in this case before he was indicted federally. The other two are victims' rights advocates. *Amicus* Center for Community Interest (CCI) "provide[s] a voice for localities and community groups on public safety and quality-if-life issues." CCI

Not only is it impossible to incarcerate every person convicted, it can, depending on the offense and offender, be counterproductive to the offender and society by actually increasing the likelihood of recidivism.

Some felons admittedly have to be incarcerated because they cannot live among us. For most offenders, however, probation is the ideal and preferred method of dealing with their crime because the offense is not sufficiently grave and the offender not sufficient antisocial to warrant incarceration, and it allows the offender to pay back his victim by reparations and the community by community service. DOJ, Office of Justice Programs, *Rethinking Probation: Community Supervision, Community Safety* 15 (Dec. 1998).[10]

Indeed, for these offenders, incarceration or intensive supervision likely *increases* the likelihood that they will recidivate because the prison environment generally is not conducive to their rehabilitation. Loren A. N. Buddress, *Federal Probation and Pretrial Services–A Cost Effective and Successful Community Corrections System*, 61 FED. PROB. 5, 11 (No. 1, Mar. 1997); Joan Petersilia, *A Decade of Experimenting With Intermediate Sanctions: What Have We Learned*, 62 FED. PROB. 3, 6 (No. 4, Dec. 1998). Probation professionals recognize that supervision that is too intense can insure failure because there are often so many conditions that even offenders that would otherwise be expected to complete probation likely can fail. *Rethinking Probation, supra*, ch. 1-3. It is a self-fulfilling prophecy, and the government's *amici* seek to insure it.

For those whom probation would benefit, a supervision

Br. at 1. *Amicus* CJLF "seeks to bring the due process protection of the accused into balance with the rights of the victim and society to rapid, efficient, and reliable determination of guilty and swift execution of punishment." CJLF Br. at 1.

[10] http://www.usdoj.gov/probation/chap2.htm.

and treatment plan is developed that allows the probation officer to monitor their progress. The U.S. Probation and Pretrial Services branch of the Administrative Office of the U.S. Courts agrees:

> Many of supervision's benefits directly affect the safety of the community and the lives of the defendants and offenders under supervision. Listed below are six such benefits illustrated by actual probation and pretrial services cases.
>
> 1. Supervision gives officers the means to enforce conditions of release ordered by the court, such as those requiring persons to perform community service or pay fines and restitution. . . .
> 2. Supervision protects the public by reducing the risk that persons under supervision will commit future crimes. . . .
> 3. Supervision may provide substance abuse treatment to enable defendants and offenders to cope without relying on drugs or alcohol. . . .
> 4. Supervision may provide mental health treatment to enable defendants and offenders to function better in the community. . . .
> 5. Supervision may provide educational or vocational training that boosts defendants' and offenders' capacity to earn a living. . . .
> 6. As an alternative to incarceration, supervision allows individuals to live with their families, hold jobs, and be productive members of society. . . .

Administrative Office of the U.S. Courts, Federal Corrections and Supervision Division, U.S. Probation and Pretrial Services, *Court & Community: An Information Series About U.S. Probation and Pretrial Services, Benefits of Supervision*

(Sept. 2000).[11]

Recidivism rates vary according to the source and who is defining "recidivate." It makes all the difference in the world whether it means the offender committed a new crime or was merely revoked for non-payment of probation fees or failure to timely report. The latter are hardly an overt threat to the safety of the community where the offender resides.[12]

Government's *amicus*, CJLF, argues that the recidivism rate is 22-64%. CJLF Br. at 8. U.S. Government studies, however, show a recidivism rate for federal probationers as low as 5.4% (1998) and 11.7% (1997) assuming a new crime. While 81.3% of federal probationers in 1998 completed probation successfully with 5.4% committing a new crime, the remainder were revoked for "technical violations" such as drug use, becoming fugitives by not reporting, or other violations of conditions of probation. DOJ BJS, *Sourcebook of Criminal Justice Statistics* at 494, Table 6.13 (1999).[13] The numbers in 1997 were 64.8% with no violation and 11.7% with a new crime. *Id.* at 540, Table 6.74. For 1997 federal parolees, 59.6% had no violation, 13.0% having a new crime. In 1998, 55.8% had no violation and only 13.4% had a new

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[11] http://www.uscourts.gov/misc/ccbenefits.pdf.

[12] *See United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting):

> It is true also of journeys in the law that the place you reach depends on the direction you are taking. And so, where one comes out on a case depends on where one goes in. . . . It makes all the difference in the world whether one recognizes the central fact about the Fourth Amendment, namely, that it was a safeguard against recurrence of abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution, or one thinks of it as merely a requirement for a piece or paper.

[13] http://www.albany.edu/sourcebook/1995/pdf/section6.pdf. DOJ BJS supports the sourcebook. [Note that the link inexplicably shows a 1995 date. The documents show a 1999 date.]

crime. *Id.* at 542, Table 6.76.

In 1986-89, it was estimated that 49% of probationers would have a disciplinary hearing for some violation of some conditions of supervision. DOJ BJS, *Recidivism of Felons on Probation, 1986-89* at 6 (Feb. 1992). But, only *9%* of probationers were rearrested for a violent crime in that time period. *Id.* "Despite the desirability of predicting offender recidivism, available data and statistical methods are insufficient to do so very accurately at this time." Joan Petersilia, *Probation in the United States: Practices and Challenges,* NAT'L INST. OF JUST. J. 4 (Sept. 1997). Even in California, an accurate recidivism rate cannot be determined because the underlying data needed to make such a determination is of poor quality. California Legislative Analyst's Office, *California Counties: A Look at Program Performance, Part III* 6-7 (May 1998).

CJLF states in its brief that probation violators interviewed in prison claimed to have committed 6,400 "murders," 7,400 "rapes," 10,400 assaults, and 17,000 robberies while on felony probation. CJLF Br. at 9-10.[14] This overlooks the significant number of offenders like respondent who are on *misdemeanor* probation. Also, these claims are grossly speculative at best because the report they are derived from warns that the figures are projections which "should not be generalized to the entire prison population"; DOJ BJS, *Survey of State Prison Inmates, 1991,* at 2 (1995); based on self-reporting by prison inmates which tends, by its very source and nature, to be exaggerated. Joan Petersilia, *A Crime Control Rationale for Reinvesting in Community Corrections,* 75 PRISON J. 479 (1995). Moreover, there is also no way of knowing the time periods involved; *e.g.,* whether an inmate interviewed in 1991 was bragging about a murder (real or imagined) that

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[14] In the report, "murder" includes all non-negligent homicide and "rape" all sexual assaults. DOJ BJS, *Probation and Parole Violators in State Prison, 1991*, at 4, Table 1 (1995).

might have happened thirty or more years earlier when the inmate was on probation.

Probation and parole are a way of life in any criminal justice system, and none can operate without it. The public expects the probation and parole system to operate as well as it can, and it wants probationers and parolees who need supervision to be supervised. That really goes without saying. *Rethinking Probation, supra,* at 15. Whether the need for supervision, however, constitutionally justifies that *all* probationers, without regard to their offense or personal nature, be required to globally waive their constitutional rights for the entire period of probation is why we are here.

Amicus NACDL submits that the California rule requiring a "Fourth Waiver" as a condition of probation of all probationers violates the Fourth Amendment. This search was of the home of an unsupervised low risk misdemeanant by police officers conducted for an obviously and blatantly law enforcement purpose. The officers and even the government in this Court make no pretext that this search was for any purpose remotely related to the respondent's supervision as a probationer. Indeed, if respondent were on unsupervised probation, how can he be *post hoc* "supervised" by a search condition?

This case thus implicates questions of sanctity of the probationer's home, his or her knowing and voluntary waiver of consent to blanket searches without any justification by law enforcement officers investigating crime and not probation officers supervising them, reasonableness of a search under the totality of circumstances, and even the "special needs" exception. But, at bottom, this case rests on the immutable fact, disputed by no one, that this search was solely for law enforcement purposes, and there was no true consent beyond a court order or submission to a claim of lawful authority. It should fail any standard under which the government seeks to justify it.

II. This warrantless police search of the home is presumptively unreasonable; Fourth Amendment "reasonableness" involving the home requires a sensitive inquiry into the interests involved.

The history and language of the Fourth Amendment specifically protects the home from unreasonable searches and seizures: "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States v. United States District Court,* 407 U.S. 297, 313 (1972), quoted in *Welsh v. Wisconsin,* 466 U.S. 740, 748 (1984). Protection of the home is a "core value" of the Fourth Amendment; *Payton v. New York,* 445 U.S. 573, 584-85 (1980); and it recognizes "'the right of a man to retreat into his own home and there be free from governmental intrusion.'" *Silverman v. United States,* 365 U.S. 505, 511 (1951), quoted in *Payton,* 445 U.S. at 590, and *Kyllo v. United States,* 121 S.Ct. 2038, 2042 (2001). Thus, warrantless entries into the home are presumptively unreasonable; *Payton,* 445 U.S. at 586 & n. 25; *Kyllo,* 121 S.Ct. at 2043; even of the home of a probationer; *Griffin,* 483 U.S. at 873; and the government has a much heavier burden to sustain them. *Payton,* 445 U.S. at 587. "With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no." *Kyllo,* 121 S.Ct. at 2042.

The government's position in this case seeks to create virtual "writs of assistance," "general warrants," or "roving commissions" into the home of a huge number of "the people" entitled to protection of their homes under the Fourth Amendment. The infamous writs of assistance and general warrants were the reason for the Revolution and why the Framers required a Fourth Amendment. *See generally Marcus v. Search Warrant,* 367 U.S. 717, 724-29 (1961); LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT, ch. 1 (1966); LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH

AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, ch. 1-3 (1937); 2 LEGAL PAPERS OF JOHN ADAMS 105-47 (1965).

In England, just before our Declaration of Independence, courts authorized "roving commissions" permitting the arrest of anybody the government chose in an effort to apprehend the person they really wanted. They were held illegal in 1763. *Wilkes v. Wood,* 19 Howell's St. Tr. 1153, 98 Eng. Rep. 489 (K.B. 1763). Shortly thereafter, the next seed of the Fourth Amendment was sown in *Entick v. Carrington,* 19 Howell's St. Tr. 1029, 95 Eng. Rep. 807 (K.B. 1765), involving a general warrant for Entick's papers. Lord Camden, the judge in the case, held that there had to be a specific grant of authority for the government to conduct such a search. *Id.*, 19 Howell's St. Tr. at 1066.

That same year, William Pitt, a member of Parliament, made his historic speech against the unrestrained power of search:

> The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail–its roof may shake–the wind may blow through it–the storm may enter–the rain may enter–but the King of England cannot enter–all his force dares not cross the threshold of the ruined tenement.

Even Pitt's impassioned speech is considered a reason for the adoption of the Fourth Amendment. LANDYNSKI, supra, at 25; *Franks v. Maryland,* 359 U.S. 360, 378 (1959) (Douglas, J., dissenting) (overruled on other grounds, *Camara v. Municipal Court,* 387 U.S. 523 (1967)).

Entick has been regularly cited by this Court since 1936 as a primary source for our Fourth Amendment jurisprudence and thinking. *See, e.g., Goldman v. United States,* 316 U.S. 129, 129 (1942); *Wolf v. Colorado,* 338 U.S. 25, 30 (1949);

Brower v. City of Inyo, 489 U.S. 593, 596 (1989); *Kyllo,* 121 S.Ct. at 2042.

Warrantless searches of the home have been presumptively unconstitutional since the founding days of the Republic. California "Fourth Waivers" are no more than "writs of assistance" or "roving commissions." As such, they violate the Fourth Amendment.

III. The Fourth Amendment question in consent to search cases is voluntariness on the "totality of the circumstances," and mere acquiesce to a claim of authority is not consent.

The government strains to sustain this search as a blanket consent, relying on the acceptance of probation as an alternative to imprisonment and *Zap v. United States,* 328 U.S. 624 (1946), *vacated on other grounds,* 330 U.S. 800 (1947), a case requiring records inspection of a business as a condition of doing business with the government.

Even in evaluating consent, "reasonableness" and the "totality of the circumstances" are always the ultimate questions. Consent, in turn, is premised upon a knowing and voluntary waiver of a constitutional right. In this type of "Fourth Waiver" case, there can be no true and voluntary waiver. A probationer has no choice in California or elsewhere, and it matters not whether the probationer is on felony or misdemeanor probation. One would presume that a misdemeanor hot check writer would have more rights to be free from random investigative criminal searches than a burglar or drug dealer, but apparently not in California–they all are subject to warrantless searches on the whim of any law enforcement officer investigating crime without any pretense of any legal justification.

A. Reasonableness is the touchstone of every Fourth Amendment inquiry.

The "touchstone of the Fourth Amendment is reasonableness." *Florida v. Jimeno,* 500 U.S. 248, 250 (1991), citing *Katz v. United States,* 389 U.S. 347, 360 (1967), quoted in *Robinette v. Ohio,* 519 U.S. 33, 39 (1996). This Court has also referred to "reasonableness" as "the fundamental inquiry in considering Fourth Amendment issues." *Chadwick,* 433 U.S. at 9. *Accord: Griffin,* 483 U.S. at 873; *Donovan v. Dewey,* 452 U.S. 594, 602 (1981).

B. The intent of the "Fourth Waiver" is pretextual criminal investigatory searches and is unconstitutional.

While the intention of the officers is irrelevant in the basic Fourth Amendment inquiry; *Whren v. United States,* 517 U.S. 806, 813 (1996); this Court has held that Fourth Amendment reasonableness requires an appraisal of the programmatic purpose of a search to determine its reasonableness. *City of Indianapolis v. Edmond,* 531 U.S. 32, 45-46 (2000); *Ferguson v. City of Charleston,* 121 S.Ct. 1281, 1290 (2001). "[T]he issue is not his state of mind, but the objective effect of his actions." *Bond v. United States,* 529 U.S. 334, 338 n. 2 (2000).

The objective effect here could not be more clear: The conduct of criminal investigatory searches of the home by law enforcement officers without justification or a warrant; in short, searches of the home without any statutory, regulatory, or judicial control whatsoever. It is an anathema to every Fourth Amendment principle articulated by this Court.

C. Reasonableness "eschew[s] bright-line rules"; it evaluates instead the "totality of the circumstances."

In *Robinette,* a consent case, this Court further held that "[r]easonableness, in turn, is measured in objective terms by examining the totality of the circumstances." *Id.*, 519 U.S. at 39. Further:

> In applying this test we have consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry. Thus, in *Florida v. Royer,* 460 U.S. 491 (1983), we expressly disavowed any "litmuspaper test" or single "sentence or . . . paragraph . . . rule," in recognition of the "endless variations in the facts and circumstances" implicating the Fourth Amendment. 460 U.S. at 506. Then, in *Michigan v. Chesternut,* 486 U.S. 567 (1988), when both parties urged "bright-line rule[s] applicable to all investigatory pursuits," we rejected both proposed rules as contrary to our "traditional contextual approach." 486 U.S. at 572-573. And again, in *Florida v. Bostick,* 501 U.S. 429 (1991), when the Florida Supreme Court adopted a *per se* rule that questioning aboard a bus always constitutes a seizure, we reversed, reiterating that the proper inquiry necessitates a consideration of "all the circumstances surrounding the encounter." *Id.*, at 439.
>
> We have previously rejected a *per se* rule very similar to that adopted by the Supreme Court of Ohio in determining the validity of a consent to search.

Id.

What the Government and its *amici* seek is a "bright line rule" of probationer consent to avoid a "totality of the circumstances" analysis which would almost always come out

against them in the case of a warrantless criminal investigative search of a probationer's home based solely on his status.

Zap provides no support to the government that a blanket consent to search the home in this type of situation is valid. *Zap* involved a form of contractual consent to a review of business records as a condition of doing business with the government. Even assuming that *Zap* is still good law,[15] it can hardly be extended to permit an intensive search of the home, considering the heavy governmental burden in justifying any warrantless entry into the home.[16]

Government asserted blanket exceptions to any Fourth Amendment rule are disfavored because they obviate application of the "totality of the circumstances" test. For example, in *Richards v. Wisconsin,* 520 U.S. 385, 393-94 (1997), the Court rejected Wisconsin's blanket drug case exception to the

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[15] We submit, based on *Lefkowitz v. Turley,* 414 U.S. 70 (1973), that the rationale for *Zap* has been undermined, but that does not have to be decided because *Zap* is distinguishable because it does not involve a search of the home.

Lefkowitz, 414 U.S. at 82-83, held:

> A waiver secured under threat of substantial economic sanction cannot be termed voluntary. As already noted, *Garrity* specifically rejected the claim of an effective waiver when the policemen in that case, in the face of a possible discharge, provided in the face of possible discharge, proceeded to answer the questions put to them. 385 U.S., at 498. The same holding is implicit in both *Gardner* and *Sanitation Men.*

Lefkowitz thus casts significant doubt on the continued validity of *Zap.*

[16] If a routine felony arrest in the home needs a warrant under *Payton,* one would think that a routine investigative entry into a probationer's home must be governed by *some* standard to be constitutional.

knock-and-announce requirement. If one blanket exception is granted, government will have a tendency to seek to extend it to other types of cases.[17] *Id.* at 394. Also, "blanket rule[s] impermissibly insulate these [issues] from judicial review." *Id.* at 393.

D. Voluntariness of consent and the totality of circumstances

"When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority." *Bumper v. North Carolina,* 391 U.S. 543, 548-49 (1968), citing *Amos v. United States,* 255 U.S. 313, 317 (1921) (coercion not consent); *Johnson,* 333 U.S. at 13 ("It was granted in submission to authority rather than as an understanding and intentional waiver of a constitutional right.").

This Court has made it clear for nearly 30 years that the Fourth Amendment question in consent searches is whether consent is voluntary on the "totality of the circumstances." We submit that the government and its *amici*'s efforts to force this square peg into the round hole of "blanket," future, or global consent violate the precept that consent be shown to be voluntary on the totality of the circumstances.

In *Schnekloth v. Bustamonte,* 412 U.S. 218 (1973), the Court held that voluntariness of consent, like the voluntariness of confessions, was determined by the totality of the circumstances, and no one factor was controlling. *Id.* at 225-27. *Id.*

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[17] In fact, *Amicus*'s counsel has encountered cases where state prosecutors are seeking a waiver of the Fourth Amendment as a condition of pretrial release, obviously where the defendant still is cloaked with the presumption of innocence.

at 227:

> Similar considerations lead us to agree with the courts of California that the question whether a consent to a search was in fact "voluntary" or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances. While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the sine qua non of an effective consent. As with police questioning, two competing concerns must be accommodated in determining the meaning of a "voluntary" consent–the legitimate need for such searches and the equally important requirement of assuring the absence of coercion.
>
> . . .
>
> But the Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion was applied, the resulting "consent" would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed.

This Court has held that a state cannot force a probationer to incriminate him or herself under pain of revocation. *Murphy,* 465 U.S. at 435, 436-37. *Accord: Garrity v. New Jersey,* 385 U.S. 493 (1967) (police officer cannot be compelled to assert his privilege against self-incrimination if it will result in discharge). *See Lefkowitz v. Turley, supra.*

E. The totality of circumstances of alleged probationer or parolee consents to search demonstrate that there is no knowing or voluntary waiver of the right to be free from unreasonable searches and seizures.

We know here it truly is a manifest fiction to claim that respondent knowingly and voluntarily waived his right to be free from warrantless searches on the whim of any law enforcement officer. *See* 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 10.10(b), at 764-65 (3d ed. 1996) ("to speak of consent in this context is to resort to a manifest fiction, for the probationer who purportedly waives his rights by accepting such a condition has little genuine option to refuse"), quoted in Brief of U.S. at 23 n. 12. Many probationers seek probation for obvious reasons, but many get no choice in probation. Indeed, society does not want to incarcerate them and run the risk of turning a marginal criminal into a professional one. What is worse, however, is that this condition is imposed on *every* defendant in California, without regard to the nature of the offender or the offense and whether the condition is necessary to the rehabilitation of any one defendant.

In respondent's case, he was subjected to a pattern condition printed on a form of the Napa County Municipal Court.[18] There was no bargaining here and there is no consideration for this alleged contract. Indeed, respondent's purported threat to the community that allegedly justified this blanket condition was considered so slight that he was placed on summary pro-

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[18] On planning to go to court in Napa County could go to the Napa County Adult Probation Services Webpage to look into conditions of probation, and he or she would find no notice that there is a blanket search condition for probation. http://www.co.napa.ca.us/internet/content/departments/Probation/ProbAdult.asp.

bation that did not even require that he report to the probation office. The fact everybody gets this search condition shows nothing about need–just law enforcement convenience, and law enforcement convenience is not a sufficient ground to dispense with the protections of the Fourth Amendment. *Johnson,* 333 U.S. at 15; *Trupiano v. United States,* 334 U.S. 699, 706 (1948).

In addition, many offenders may be placed on probation against their will; *i.e.,* they will have no choice but to be placed on probation because the court is not going to imprison them and take up precious bed space for a low level offense. *See, e.g.,* 18 U.S.C. § 3561(b) (court must probate defendant if it will not incarcerate for some crimes). As in California and most other states, supervised release in the federal system is compulsory after a prison term. 18 U.S.C. § 3583(a); U.S.S.G. § 5D1.1(a). It is additional punishment. *United States v. West,* 898 F.2d 1493, 1504 (11th Cir. 1990); *United States v. Eyler,* 67 F.3d 1386, 1393 (9th Cir. 1995) ("The provision of just punishment is not a criterion for supervised release conditions."); *United States v. Thomas,* 135 F.3d 873, 875 (2d Cir. 1998).

Amicus submits that the distinction between consent or lack of consent in this case is ultimately meaningless to the Court's evaluation of reasonableness of this type of search. If the government's blanket consent argument is accepted, it would of necessity have to apply to all probationers, whether they consented to a search term or had it forced upon them. Otherwise, it would be unworkable. After all, how would a law enforcement officer bent on searching a probationer know whether that probationer consented to a search term or not? Thus, the government's position on the surface must be based on consent to make it sound reasonable, but it cannot rely on consent at all in its application. That being the case, the government's consent theory is deprived of its rationale, and that makes a search conducted under it unreasonable.

F. As a matter of reasonableness, a "Fourth Waiver" is not required in other jurisdictions, including the federal courts.

The power asserted by the State of California and the United States in this case is extraordinary.

A California probationer, someone who never went to jail for his crime, has less rights to be free from a search than does a federal parolee because a federal parolee is only subject to search by his or her "parole officer." United States Parole Commission, Rules and Procedures Manual § 2.85(a)(12) (Mar. 1, 2001).[19] The Parole Commission disfavors searches by parole officers. If there is reason to believe the parolee committed a crime, then law enforcement officers should conduct the search. *Id.*, Notes and Procedures § 2.85-20.[20]

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[19] http://www.usdoj.gov/uspc/rules_procedures/rulesmanual.htm:

> (12) The parolee shall permit visits by his Supervision Officer to his residence and to his place of business or occupation. He shall permit confiscation by his Supervision Officer of any materials which the officer believes may constitute contraband in the parolee's possession and which he observes in plain view in the parolee's residence, place of business or occupation, vehicle(s), or on his person. The Commission may also, when a reasonable basis for so doing is presented, modify the conditions of parole to require the parolee to permit the Supervision Officer to conduct searches and seizures of concealed contraband on the parolee's person, and in any building, vehicle, or other area under the parolee's control, at such times as the officer shall decide.

[20] *Id.:*

> (a) Search Policy. Searches by Supervision Officers are

Home visits are not mandatory conditions of probation in the federal system–they are only discretionary with the sentencing court. 18 U.S.C. § 3563(b)(16) ("permit a probation officer to visit him at his home or elsewhere as specified by the court"); U.S.S.G. § 5D1.2(c)(10) ("The defendant shall permit a probation officer to visit the defendant at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer . . . .")

Similarly, the normal conditions of felony probation in New York City mention no more than home visits. Supreme Court of the State of New York, Conditions of Probation, S.C. Crim. Form No. 19, condition 2 (April 1974) ("Permit the probation officer to visit him at his home or elsewhere").[21]

Few cases permit law enforcement officers to conduct probation searches. Jay M. Zitter, Annot., *Validity of Requirement That, as a Condition of Probation, Defendant Submit to Warrantless Searches,* 2000 A.L.R.5th 3, § 10 (2000).

It is possible that a narrowly tailored full search condition could be imposed as a special condition of probation, but caselaw practically everywhere outside of the state courts of California would require that the search term bear some rela-

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disfavored. Other techniques should be relied upon to monitor compliance with conditions of supervision and, when information exists that indicates possession of contraband or evidence of a crime, consideration should be given to referring the matter to an appropriate law enforcement agency for investigation. When there are no other alternatives, searches should be conducted only (1) pursuant to conditions of release that specifically permit such searches or (2) pursuant to the consent of the parolee freely and voluntarily given.

[21] Source: New York City Department of Probation Operations, 33 Beaver St., 22nd Floor, New York, New York 10004 (received by fax, August 2001).

tion to the needs of the offender and society. *See, e.g., United States v. Prendergast,* 979 F.2d 1289, 1293 (8th Cir. 1992) (terms of probation must be reasonably related to the offense, the history of the defendant, and only as extensive as "reasonably necessary to effect the purposes of sentencing"; U.S.S.G. § 5B1.3 (b)).

G. What about the rights of third persons?

Discussed nowhere in the briefs is the rights of innocent third persons. If a probationer can be compelled to submit to warrantless searches by any law enforcement officer in America without regard to the gravity or nature of the offense, what about the people that live with the probationer? Do not the probationer's children, parents, spouse, or roommates have any say in the matter? Can they be subjected to a search merely because of whom they choose to live with or whom they must live with? *See State v. Johnson,* 748 P.2d 1069 (Utah 1987) (limited expectation of privacy remains for the others); *Diaz v. Ward,* 437 F.Supp. 678 (S.D.N.Y. 1977) (civil rights case; families of parolees retain privacy rights sufficient to survive motion to dismiss).

IV. This search cannot be justified under the "special needs" exception; the motive of this search was purely for law enforcement purposes, and that removes it from "special needs."

For the "special needs" exception to apply, there must be a governmental need for the search beyond the normal need for law enforcement. Where the search is for law enforcement purposes, as was this one, there are no special needs justifying dispensing with the requirements of the Fourth Amendment. Otherwise, the government could always conjure up a "special need," and the protections of the Fourth Amendment would be obviated.

A. There must be special needs "beyond the normal need for law enforcement"

The "special needs" exception was first recognized by the Court in *New Jersey v. T.L.O.*, 469 U.S. 325, 332 n. 2 (1985). Justice Blackmun concurred and limited it: "Only in those exceptional circumstances in which special needs, *beyond the normal need for law enforcement,* make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers." *Id.* at 351 (concurring opinion; emphasis added). *Ferguson,* 121 S.Ct. at 1286 n. 7.

Shortly thereafter, the special needs exception was equated with administrative searches in *New York v. Burger,* 482 U.S. 691, 702 (1987), "where the privacy interests are weakened and the government interests regulating particular businesses are concomitantly heightened, a warrantless inspection of commercial premises may well be reasonable within the meaning of the Fourth Amendment." The Court recognized, however, that even the administrative search rationale provides no support to the government's position if the search was ulteriorly for an investigative purpose. *Burger,* 482 U.S. at 716 n. 27 ("There is, furthermore, no reason to believe that the instant inspection was actually a 'pretext' for obtaining evidence of respondent's violation of the penal laws. It is undisputed that the inspection was made solely pursuant to the administrative scheme.").[22]

This Court's probation search case, *Griffin v. Wisconsin*, was decided one week after *Burger*, and the Court held that probation "[s]upervision . . . is a 'special need' of the State permitting a degree of impingement upon privacy that would not be constitutional if applied to the public at large. *That*

[22] *Burger* was cited in *Edmond*, 531 U.S. at 31, as an example of a programmatic inquiry into purpose of the search.

permissible degree is not unlimited, however, so we next turn to whether it has been exceeded here." *Id.,* 483 U.S. at 875 (emphasis added). The Court proceeded to evaluate the statutory structure of the Wisconsin state probation system, and it concluded the state system satisfied the reasonableness requirement of the Fourth Amendment.

This Court found it significant that the search was conducted by a probation officer and not a law enforcement officer. *Id.* at 876 ("Although a probation officer is not an impartial magistrate, neither is he the police officer who normally conducts searches against the ordinary citizen."). The structure of the Wisconsin system required that the probation officer have reasonable grounds to believe that the probationer was in violation of a condition of probation, and that made it constitutional. *Id.* at 870-71, 875-76. Most notably, everything that the Court relied on in *Griffin* to sustain Wisconsin's probation search system is absent from this case.

Last Term, this Court decided *Ferguson,* 121 S.Ct. at 1290: "In looking to the programmatic purpose, we consider all the available evidence in order to determine the relevant primary purpose." The police in *Ferguson* were extensively involved in the development of the medical center's policy and in deciding who received the relevant information. *Id.* Also, it was apparent that the policy was developed for law enforcement purposes. *Id.* at 1291-92:

> Because law enforcement involvement always serves some broader social purpose of objective, under respondents' view, virtually any nonconsensual suspicionless search could be immunized under the special needs doctrine by defining the search solely in terms of its ultimate, rather than immediate, purpose. Such an approach is inconsistent with the Fourth Amendment. Given the primary purpose of the Charleston program, which was to use the threat of arrest and prosecution in order to force

women into treatment, and given the extensive involvement of law enforcement officials at every stage of the policy, this case simply does not fit within the closely guarded category of "special needs." (footnotes omitted)

B. "[B]alancing the need for the search against the invasion the search entails."

The Court has long relied on a balancing of interests in determining whether a particular intrusion is unreasonable.

> [T]he Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable. . . . What is reasonable, of course, "depends on all the circumstances surrounding the search or seizure and the nature of the search or seizure itself." . . . Thus, the permissibility of a particular practice "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion or legitimate governmental interests."

Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 618 (1989). *See Camara v. Municipal Court,* 387 U.S. 523, 536-37 (1967) (also, "there can be no ready test for determining reasonableness other than balancing the need to search against the invasion which the search entails.").

Balancing of interests here clearly favors the individual because law enforcement officers are using a probation condition as an excuse to conduct a general criminal investigatory search of the home. Under *Griffin, Edmond,* and *Ferguson,* not to mention *Wilkes v. Wood* and *Entick v. Carrington,* the search is unreasonable.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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